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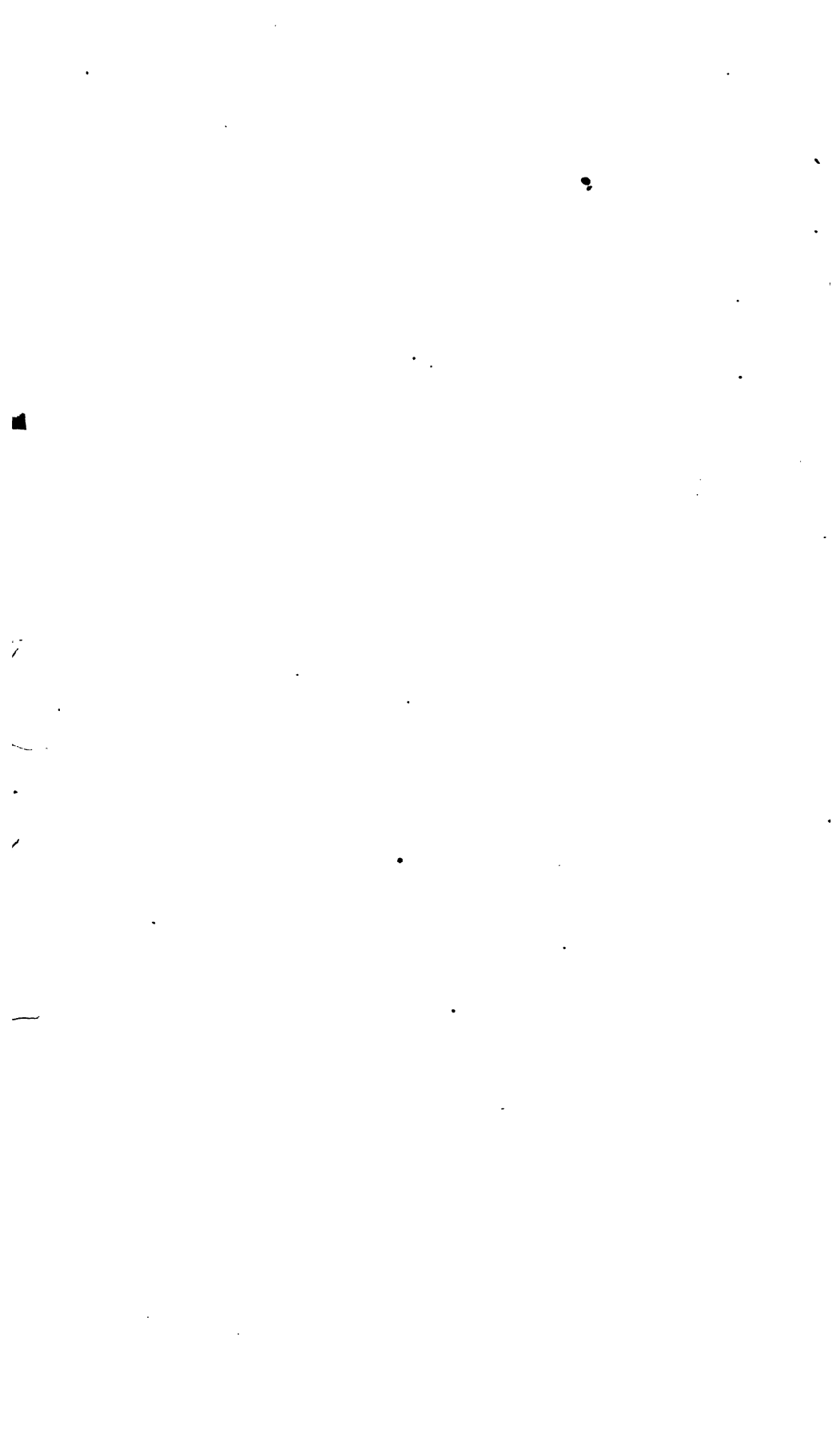
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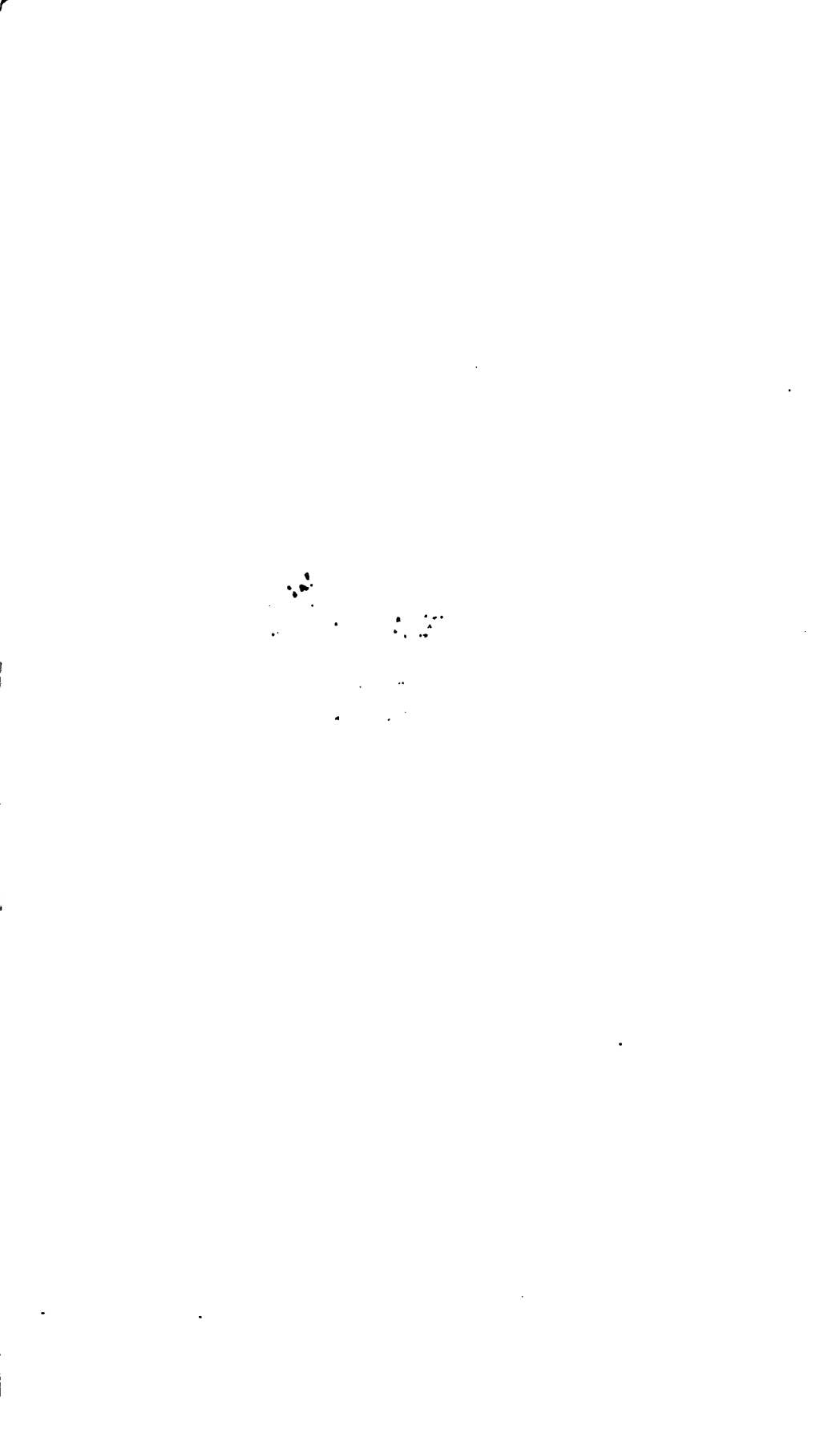
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LOUISIANA
ANNUAL REPORTS.



Apr 30

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT



VOLUME VIII.

FOR THE YEAR

1853.

W. M. RANDOLPH,
REPORTER.

NEW ORLEANS:
PRINTED AT THE OFFICE OF THE LOUISIANA COURIER.

1854.

Recd April 21, 1856

J U D G E S
OF THE
S U P R E M E C O U R T,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPHUS ROST, HON. THOMAS SLIDELL, HON. WILLIAM DUNBAR.	}	<i>Associate Justices.</i>
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ISAAC JOHNSON, *Attorney General.*

At page 277 commence the Reports after the organization of the Judiciary under the Constitution of 1852. Under that organization the Supreme Court was composed of the following Judges:

HON. THOMAS SLIDELL, *Chief Justice.*

HON. C. VOORHIES, HON. A. M. BUCHANAN, HON. A. N. OGDEN, HON. J. G. CAMPBELL.	}	<i>Associate Justices.</i>
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ISAAC E. MORSE, *Attorney General.*

THE decisions rendered in Opelousas in 1853 were not received by the Reporter until the cases decided at the Fall Term at New Orleans were in the press. They will be found, together with the missing decisions at Opelousas in 1852, in this volume.

The term of the Court at Alexandria and Monroe, for 1853, failed, owing to the prevalence of the yellow fever.



RULES OF COURT.

In consequence of the great number of cases upon the docket, the following rule is adopted, to-wit :

It is ordered that not more than one hour will be allowed for an opening argument, one hour to each Counsel for the defence (not exceeding two) and one hour for the closing arguments, except where, in special cases, the Court, on previous application, may otherwise order.

Adopted December 6th, 1853.

It is ordered that the 5th rule be so amended as to entitle all cases to be placed on the Summary docket, which by law are entitled to be and have been tried summarily in the Court below.

Adopted April 24th, 1854.

I. Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit and thereupon the cause shall be heard and determined as in other cases.

II. When the appellant dies, pending the appeal, if his proper representatives be known and reside within the State, and have not made themselves parties to the cause, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days, and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

III. If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appeal will be dismissed, and cause the said order to be published three times in a newspaper printed at the Seat of Government of the State, or in the place

RULES OF COURT.

where the Court sits, and upon proof of such publication and default of appearance, the appellee may have the appeal dismissed or the cause heard and determined as in other cases.

IV. If the appellee die, pending the appeal, and his proper representatives be known and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined as in other cases.

V. If the appellee's proper representatives be not known or do not reside in the State, the appellant may on affidavit obtain an order that unless they appear and become parties within three months from the publication, the appellant will proceed to have the case heard and determined and cause the said order to be published three times in a newspaper printed at the Seat of Government of the State, or in the place where the Court sits, and upon proof of such publication and default of appearance the appellant may proceed to have the cause heard and determined as in other cases.

VI. In country cases the time of personal summons may be reduced on special application according to circumstances.

Adopted May 24th, 1854.

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C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

JANUARY, 1853.

JUDGES OF THE COURT.

HON. GEORGE EUSTIS, *Chief Justice.*

HON. PIERRE ADOLPH ROST.

HON. THOMAS SLIDELL,

HON. WILLIAM DUNBAR,

} *Associate Justices.*

LAPENE & FERRE v. SUN MUTUAL INSURANCE CO. OF NEW YORK.

As a general rule, the warranty of seaworthiness during the whole voyage is the same, whether the insurance be on the ship, or on goods, and the underwriters are not bound to pay any loss resulting from that cause after the commencement of the voyage.

If there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Rose-lius*, for plaintiff. *Maybin*, for defendant and appellant.

EUSTIS, C. J. This is an action to recover the sum of \$8,000, the amount of merchandize shipped on board the schooner William C. Preston, and insured by the defendants for a voyage from New Orleans to the port of Brazos in the State of Texas. There was judgment for the plaintiffs, and the defendants have appealed.

The vessel in which the merchandize was shipped was of some fifty tons burthen, and lay at the Old Basin. The defence is, that she was not seaworthy, and that she deviated from the proper course of the voyage.

It appeared that the schooner left the Basin on the 2d of August, 1851, and from the difficulty in the navigation of the Bayou St. John, she did not get over the bar and leave the Picketts on her voyage until the 6th following. On Friday, the 8th, she put into the Bay of St. Louis for the purpose of obtaining water. She made sail, after taking in her water, on the 9th, and three days after, was burned off Breton's Island, and with her cargo totally lost. During the delay of the vessel at the mouth of the Bayou St. John, the Captain not knowing,

LAPENS & FERRE as he says, when there would be water enough to take her over the bar, left her on a visit to his father-in-law at the Bay of St. Louis, and only joined the schooner at about twenty miles from that place, and one or two miles from the Rigolets. Finding her short of water he put into the Bay of St. Louis in order to procure it.

The exertions of those on board to get the fire under being unsuccessful, she was abandoned, in consequence of the danger created by her having gunpowder and spirits on board; in a few minutes after she exploded, and everything on board, including the log book, was lost.

The case appears to have been tried in the Court below in such a manner as not to have elicited reasons for the judgment, or any statement of the grounds on which it was given.

There does not appear to have been any attempt to contradict or weaken by counter evidence the testimony of the plaintiffs' witnesses. A single witness was examined for the defence on a point about which there is no contest. The evidence has been much commented upon in this Court. It was believed by the District Judge, and has not been successfully impugned by the scrutiny before us.

The want of water was caused, as is said, by the negligence of one of the men in leaving open the cock of one of the pipes containing water, and, we think, the evidence establishes such a condition of necessity as authorized the delay and deviation at the Bay of St. Louis in order to procure it.

We think there is nothing in another ground of defence urged in this Court, viz: that the risk was unduly enhanced by their being gunpowder among the plaintiffs' goods. The invoice shows that some twenty kegs of powder were on board. We do not find any exception in the policy as to gunpowder. It is construed in the general terms "lawful goods and merchandize," under which the plaintiffs insured, and is an article notoriously suitable to the market to which the cargo was destined. It clearly comes within the word *cargo*, which is endorsed on the policy. See *Duer on Ins.*, vol. 2, p. 444. It is contended that the schooner was not seaworthy, in a technical sense, because at the time she sailed on her voyage her captain was not on board. He was on board at the time she broke ground in the Basin on the 2d of August, and continued in her after her arrival at the Picketts. Finding she could not cross the bar without removing her cargo, he left her in charge of the mate on a visit to the Bay of St. Louis, as has been before stated. It is admitted in argument that she was unseaworthy in making sail in this condition without her Captain on board, and if a loss had happened while it continued, that the underwriters would not have been responsible; but it is urged that the effect of the unseaworthiness is not continued beyond the existence of the cause that produced it; and as the loss had no connection with this cause, but was from a peril insured against, the underwriters are bound to indemnify the insured.

As a general rule, the warranty of seaworthiness during the whole voyage, is the same, whether the insurance be on the ship or on goods, and the underwriters are not bound for any loss resulting from that cause after the commencement of the voyage. *McDowell & Peck v. the Memphis Insurance Company*. 7th Ann. Rep. and cases there cited.

Lord Tenterden in the case of *Weir & Aberdeen*, 2d Barnwell and Alderson, 320, asserted the law to be, that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This doctrine is understood to have been called in

question in the opinion of the Supreme Court of the United States, delivered by *Mr. Justice Story* in the case of *McLanahan v. The Universal Insurance Company*. 1 Peters Rep., 184. We delayed the decision in the cases of insurance on cargo by this vessel for the purpose of considering the possible objections to this just and reasonable principle. It has received the approbation of *Kent*; and *Judge Phillips*, in his work on Insurance has placed it beyond all question as a settled rule of American jurisprudence. This learned author thus states it. This warranty (of seaworthiness) is not violated so as to defeat the insurance by a merely incidental, temporary deficiency at the commencement of the risk in fitness for the voyage that may be easily remedied, and is so in fact. There are many cases which have been decided on this principle. One was of the needle of a compass attracted by some iron work; another of a vessel being temporarily unseaworthy for want of sufficient ballast; another of a cargo so stowed as to cause the vessel to be out of trim; another of a vessel not having a pilot and yet getting safe over pilot ground. *Phillips on Insurance*, No. 726. The Courts in New York have decided in the same sense. In the case of the *American Insurance Company v. Ogden*, the Supreme Court of that State decided that the fact that a vessel was not supplied with anchors when she left port cannot discharge the insurers when the loss was sustained from an injury received from the winds and waters while the vessel was at sea, where it was totally immaterial whether she had one or two anchors, or none at all, so far as the injury is concerned. 15th Wendell, 532; 20th id., 287.

This temporary unseaworthiness, occasioned by the absence of the Captain from the schooner on her passage down Lake Pontchartrain and through the pass of the Rigolets, constitutes no defence to the plaintiffs' action.

Conceding that the loss of the water from the cask, which created the necessity for the deviation in putting into the Bay of St. Louis, to have been the consequence of the neglect of those on board of her, we consider the fact of deviation as being no defence to this suit. It is not proved that the neglect occurred during the absence of the Captain from the schooner. If it had been, a materially different case would have been presented. *Waters v. The Louisville Insurance Co.* 11 Peters, 224. *Phillips on Insurance*, 733 and 734.

There is nothing in this case which creates any suspicion which affects injuriously the plaintiffs, who were shippers of part of the cargo. At the same time the complexion of the facts which appear in evidence is such as to authorize us in expressing our regret that the case was not sifted to the bottom. So far as our action is concerned, however, we are bound to presume that the underwriters have left it in the situation the most favorable to their interests, and we must decide it, accordingly, on the evidence.

It is proper to observe that, under all the policies on goods shipped on board this vessel, the barratry of the master and mariners is one of the risks insured against.

The judgment of District Court is, therefore, affirmed with costs.

ST. VICTOR BARRET v. NEW ORLEANS INSURANCE COMPANY OF NEW ORLEANS.

APPEAL from the Fifth District Court of New Orleans. *Buchanan, J. Du-four*, for plaintiff. *Benjamin & Micou*, for defendants and appellants.

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INS. CO.

EUSTIS, C. J. This is an action on a policy of insurance on goods shipped on board the schooner *W. C. Preston*. The facts do not appear to be materially different from those disclosed in the case of *Lap  ne & Ferr  *, just decided.

For the reasons given in the opinion filed in that case, the judgment appealed from is affirmed with costs.

FREDERIC BONIS v. JULES LOUVRIER.

Plaintiff and Defendant formed a commercial partnership. Plaintiff was to furnish the entire capital, upon which he was to receive six per cent. interest and two-thirds of the profits. Defendant was to receive sixty dollars per month for his expenses and one-third of the profits. Plaintiff did not furnish the stipulated capital—and for want of sufficient means the partnership was dissolved with a loss equal to the whole amount of capital furnished. *Held*: Defendant was not liable for any portion of the loss, and was entitled to his sixty dollars per month. Both parties seek to avoid a loss, and it should be borne by him who was most in fault.

APPEAL from the Second District Court of New Orleans, *Lea, J. Dufour*, for plaintiff. *Schmidt*, for defendant and appellee.

Rost, J. On the first of May, 1844, the plaintiff and defendant formed a commercial partnership which was to continue three years. The capital of the firm was to be furnished exclusively by *Bonis* and was to be derived, 1st. from the stock of merchandise then in his store, of which the defendant had charge, valued at \$6,388;

2d. From the nett proceeds of the liquidation of the old business of *Bonis*, the amount of which was valued by him at about \$10,000.

He was to receive six per cent. interest on the capital advanced and two-thirds of the profits of the partnership; the other third of the profits being the share of the defendant.

Bonis furnished little more than one-fourth of the capital he had promised. For want of sufficient means the firm could not be carried on to advantage and was dissolved on first of January, 1847, with a loss at least equal to the entire capital furnished.

The object of the plaintiff in this suit is to recover one-third of that loss and also the sum of \$1,795 80, which the defendant received for his personal expenses during the continuance of the partnership. The defendant resists the claim on the ground that the plaintiff was in fault in not furnishing the capital which he had bound himself to bring into the firm and that this alone prevented the firm from realising large profits. He claims the probable amount of those profits in reconvention.

The District Court rejected the claim against the defendant for his share of the loss and his own demand in reconvention, but gave judgment in favor of the plaintiff for the sum received by the defendant.

The latter has appealed, and as the plaintiff has not prayed for an amendment of the judgment, we have only to pass upon the claim allowed.

It is always difficult to apply rules of law where the facts are vague and uncertain. We fully agree with our learned brother of the District Court that "*le produit de la liquidation des anciennes affaires de Mr. Bonis*," which he, *Bonis*, brought into the firm as part of its capital, was a thing indeterminate and subject to contingencies of which the defendant must have been aware; at the same time it must be conceded that while both parties may have been disappointed by the result of the liquidation, *Bonis* was mainly in fault. He, it was

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who represented those assets as worth about \$10,000, and there is nothing to show that the defendant knew what they consisted of, or that the cause of their loss originated after the formation of the partnership. The *anciennes affaires* of the plaintiff embraced other business besides his previous partnership with *Iboe*, and it does not appear that the defendant had any reason to believe that the promised capital was to be mainly derived from that source.

Under the eighth article of the act of partnership, the defendant was authorized to take out of the funds of the firm sixty dollars a month for his personal expenses, and the amount thus taken was to be deducted from his share of profits. This stipulation was indispensable, the defendant having no capital and bringing into the firm nothing but his industry and his knowledge of business. The amount he has received is less than he was entitled to take and the plaintiff now sues to make him refund on the ground that no profits have been made. The evidence satisfactorily shows that the failure to make profits was caused by the want of capital which the plaintiff had agreed to furnish. Taking this fact into consideration, we think that the equitable rule under which the other claims in the suit were rejected by the District Judge, applies with at least equal force to the claim allowed. Both parties seek to avoid a loss, and it should be borne by him who is the most in fault.

We are of opinion there must be judgment for the defendant.

It is ordered that the judgment, so far as appealed from, be reversed and that there be judgment in favor of the defendant, with costs in both Courts.

Rehearing refused.

THOMAS HUDNALL v. WATT & DE SAULLES and ROBERT Y. JONES.

Parole evidence is inadmissible to prove either the sale of a slave, or acknowledgments tending to show the ratification of an unauthorised sale of a slave.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. J.* and *J. Henderson*, for plaintiff and appellant. *Benjamin & Micou and Day*, for defendants.

SLIDELL, J. The plaintiff claims a slave in the possession of the defendants. They, being lessees, called in their lessor, *Jones*, who pleaded the general issue, prescription and title. There was judgment for the defendants, and the plaintiff appealed.

A bill of exceptions was taken by the plaintiff to the admission of the testimony of one *Moore*, who proved the verbal acknowledgment of the plaintiff that he had sold the slave in New Orleans to one *Brown*, under whom *Jones* claims, through various mesne conveyances. It may be conceded that parole evidence is admissible to prove the sale of a slave made in a State of this Union, where such property may be sold by a verbal contract. But as the witness expressly stated that he understood, both from *Hudnall* and *Brown*, that the sale took place in New Orleans, we are of opinion that the parole evidence was inadmissible, under the positive provisions of the Code and numerous decisions made upon them. "All sales of immovable property, or slaves, shall be made by authentic act, or under private signature. All verbal sale of any of these things shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." Civil Code,

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2415. "Every transfer of immovable property, or slaves, must be in writing; but if a verbal sale, or other dispositions of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property or slaves thus sold." *Ib.*, 2255. "The allegation of extra-judicial confessions, merely verbal, is useless in all cases of a demand, in support of which testimonial proof would be inadmissible." *Ib.*, 2269. These articles of the Code, or similar articles of the Code of 1808, and the admissibility of such evidence as we are considering, have been acted upon in many cases. See *Adams v. Gaynard*, 5 New Series, 250. *Crill v. Phillips*, 6 New Series, 302. *Bradford v. Clark*, 7 Louis., 150. *Haydel v. Betts*, 6 Rob., 439.

We are also of opinion that the Court erred in admitting testimony as to verbal acknowledgments of the plaintiff, tending to shew a ratification of an unauthorized sale made by *Brown*. The same rules we have already noticed, involve its exclusions. See *Adams v. Gaynard*, and the other cases above cited. In this case, as in the other first considered, the parole evidence goes to defeat the plaintiff's title.

Nor are we able to sustain the judgment upon the prescription of five years, established by Article 3444 of the Code, which provides that the property of slaves is acquired in five years between parties residing in the State, and ten years when any of them reside out of the State, where the possessor has a title and holds in good faith. *Jones* exhibits no title, and the evidence is insufficient even to establish a continuous possession during five years in the antecedent vendee, *Bailey*, or *Bailey's* vendee, *Botts*, from whom, in his answer, *Jones* alleges that he purchased.

It is proper to add that no call for the note of *Brown*, spoken of by some of the witnesses, was made, pursuant to the Code of Practice, Art. 140.

It is therefore decreed that the judgment be reversed, and that this cause be remanded for a new trial, the appellees to pay the costs of the appeal.

JOHN MEGGETT v. GEORGE LYNCH.

Matters available in the defence of a suit will not authorize an injunction.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Wolfe & Singleton* and *James W. Duncan*, for plaintiff and appellant. *Roselius and Bright*, for defendant.

EUSTIS, C. J. This appeal is taken by the plaintiff from a judgment of the Court of the Fifth District of New Orleans, dissolving an injunction which had been obtained at his instance.

This injunction was against any further proceedings under a writ of *fiery facias* which had been issued on a certain judgment which had been rendered in favor of the defendant against the plaintiff.

The injunction was dissolved on motion of the defendant's counsel, and damages of ten per cent. were awarded against the plaintiff and his surety, on the injunction bond.

The *fiery facias*, the proceedings under which were enjoined, was issued on a judgment obtained by the present defendant on a promissory note made as far back as 1845. The judgment was rendered on the 21st of February, 1851, the

suit having been put at issue in 1848, the year in which it was instituted. The defence was the want of consideration of the note, and a legal discharge of the indebtedness.

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The matters charged in the petition as grounds for the injunction, took place in 1845, and were available to the plaintiff in the defence of that suit, if at all available. It is clear that on this ground alone, under the well settled jurisprudence of this Court, no injunction ought to have been granted to relieve the plaintiff, and the District Court did not err in dissolving it. Hennen's Digest *verbo injunction*, II., 6, 45, 50, 64. The facts alleged by the plaintiff are certain judicial proceedings in execution of *Lynch* against certain slaves mortgaged to secure the note on which the judgment complained of was rendered, by which proceedings the plaintiff urges that his rights as a surety on the slaves have been impaired. These proceedings having been public and matters of record, and concerning property which the plaintiff had an interest in making available for the security of his responsibility on the note, his allegation of want of knowledge, &c., is not to be heeded on an application of this kind.

For the reason of the amount called for by the execution, and the costs having been deposited in the hands of the Sheriff by the plaintiff, and the agreement respecting the same, we do not feel ourselves at liberty to amerce the party in a larger sum than that fixed by the judgment of the District Court.

The judgment of the District Court is therefore affirmed with costs.

JAMES B. PRESCOTT v. JAMES N. SPURLOCK et al.

Actions en declaration de simulation may be brought on all claims sounding in money, although they be liquidated by a judgment, or pending in other suits.

In these actions an incidental prayer for judgment on a claim for which there is a pending suit—in the event that none shall have been rendered in such suit—is not sufficient to defeat the main action, and on proper proof, the simulation may be decreed, although there should be no judgment for the amount demanded.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Perkins, jr., J.*

Plaintiff sued *James N. Spurlock* for various causes of action, on a note, open account, judgment, &c. He charged that certain property owned by *James N. Spurlock* had been fraudulently mortgaged to *Drury Spurlock* in order to defeat plaintiff's right. He averred that suits were now pending for portions of the claims herein sued for, and prayed that if no judgment should be obtained by the time of the final hearing on this portion, that he have judgment for the several amounts, and that the mortgage, &c., be set aside.

Defendants excepted to the petition "on the ground that all the causes of action against defendant, as set forth in plaintiff's petition, are, by plaintiff's own shewing, now depending and undecided, &c," except "the suit No. 1728, which is in a judgment—that an execution has issued on said judgment, &c., levy made, &c., on property alleged to be that of this defendant."

Graham, for plaintiff and appellant. *Dubose*, for defendants.

Rost, J. This is an action *en declaration de simulation*, which may be brought on all claims sounding in money, although they be liquidated by a judgment, or pending in other suits, &c. 2nd *Zacharie*, 841; and authorities there cited.

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SPURLOCK.

It is true that the plaintiff incidentally asks that, on the final hearing of the cause, if judgment shall not have been rendered in the suits pending upon a portion of his claim, he may have judgment for it in this suit, but that prayer is not sufficient to defeat the plaintiffs' main action, and on proof of the claim, and of the other facts alleged, the simulation may be declared, although there should be no judgment for the amount claimed.

We are opinion that the exception of *lis pendens* should have been overruled, and the defendant allowed to proceed in his main action.

It is ordered that the judgment be reversed, the exception overruled, and the case remanded for further proceedings according to law, with directions to the District Judge to proceed and decide the question of simulation. It is further ordered that the defendant and appellee pay the costs of this appeal.

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CECILY BECKLEY et al. v. MARY CLARK, adm.

A promise to pay a sum of money to a wife, for a wound, inflicted by the party promising, on her husband—whether or not death ensued—is binding.

**A**PPEAL from the District Court, Tenth District, Parish of Madison, *Perkins, jr., J. Amonett*, for plaintiff. *Snyder*, for defendant and appellant.

**EUSTIS, C. J.** This appeal is taken by the defendant from a judgment rendered against the succession of the late *Allen Clark*, in favor of the plaintiff, for the sum of \$482 50, with interest from the judicial demand.

The action is brought on a promise alleged to have been made by the deceased, *Allen Clark*, to the plaintiff, who was the wife of *Charles Beckley*, to pay her the sum of five hundred dollars, for damage done to her said husband by said *Clark*, \$250 of which were to have been paid in merchandise and necessary supplies for the use of her family in the year 1849, and \$250 in the next succeeding year, of which some \$17 50 were received in the lifetime of said *Clark*.

This promise and agreement is proved to have been made, as alleged, on the 5th November, 1848. *Beckley* died of the wounds inflicted on him by *Allen Clark*, on the 18th following, and payment of a portion of this sum, by the direction of *Clark*, is also proved to have been made.

It is contended that there was no adequate consideration for this agreement. Whether the sum agreed to be paid to the plaintiff was to repair the injury caused her by the wounding of her husband, or by his death, the promise is equally obligatory. *Hubgh v. the Carrollton Railroad Co.*, 6th Annual Rep., 498. Code, Art. 1749, 1750, § 2; 1752, § 2.

The judgment of the District Court is therefore affirmed, with costs.

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JOHN THORNE v. A. H. TAIT and EDGELL, MULFORD & Co.

Where the agent contracts for a foreign principal, the credit is presumed to be given to him.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. E. C. Mix*, for plaintiff. *Wolfe and Singleton*, for *Edgell, Mulford & Co.*, appellants.

Ross, J. The defendants being sued for work done on their account by the plaintiff, in putting up a steam train, for the manufacture of sugar, on the plantation of *John Hagan*, pleaded as a defence that they were acting in the premises as the agents of *Walworth & Nasson*, of the city of Boston, to the knowledge of the plaintiff, and had never made themselves personally liable for his claim.

JOHN THORNTON
C.
A. H. TAYT and
EDGELL, MILFORD
& Co.

We think, with the District Judge, that under the facts of the case the defence is not tenable. The question, in all cases of this kind, is simply to whom the credit is given, and where the agent contracts for a foreign principal, the credit is presumed to be given to him. Paley on Agency, No. 369 and 373.

The evidence in the record, so far from rebutting that presumption, comes in aid of it, and fully satisfies us that credit was given exclusively to the defendants.

The judgment must be affirmed, but we do not consider this a proper case for the allowance of damages.

Judgment affirmed, with costs.

JOSIAH STANBOROUGH v. DUGALL MCCALL.

DAVID STANBOROUGH, Curator, v. SAME—Opposition of R. H. STOCKTON.

Under a *f. ft.* from the Circuit Court of the United States, in a suit against *David Stanborough*, the Marshall, without any permission from the District Judge, went into the Clerk's office in the District Court of the Parish of Madison, in which were certain suits pending, entitled *J. Stanborough v. D. McCall*, and seized the notes sued on, and also made, what he terms in his return, a seizure of the judgments, or decrees of seizure and sale, and gave notice of seizure to the Clerk of the Court and to the Curator, *D. Stanborough*, but none to *McCall*, the debtor. *Stockton* afterwards bought these notes at the sale made by the Marshall. *Held*: that the proceedings of the Marshall were a gross and unprecedented disturbance of the Clerk in the performance of his official duties as custodian of the records of the Court, and conferred no title upon *Stockton*, at whose instigation, it seems, they were had. The Marshall had no right to take the notes without a previous order from the District Court, in whose custody they were; and the acts done by the Marshall were insufficient to effect a seizure and form the basis of a sale.

A PPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Bemis* for plaintiff. *Stockton* and *Steele* for opponent.

SLIDELL, J. *Stockton's* claim to the money in the hands of the Sheriff, rests upon the validity of his alleged title to the notes which bear mortgage upon the land sold. The District Judge was of opinion that *Stockton's* title was invalid, and gave judgment against him, from which he has appealed.

Stockton claims under a sale by the Marshall of the United States, under the following circumstances: One of the mortgage notes was on file in the Clerk's office of the District Court for the Parish of Madison, in the suit of *J. Stanborough v. D. McCall*, the maker of the note. In this suit there was an order of seizure and sale. The two other notes were, in like manner, on file in the suit of *Stanborough, curator, v. McCall*, in which there was also an order of seizure and sale.

Under a *feri-facias* issued from the United States Circuit Court, in the suit of the *Farmers' Bank of Virginia v. David Stanborough*, curator, the Marshall of the United States, without any permission from the District Judge of Madison, in whose court the suits were pending, went to the Clerk's office, seized the notes, and also made, what he terms in his return, a seizure of the judgments or decrees of seizure and sale in the two suits, and gave notices of seizure to the Clerk of the Court and to *D. Stanborough*, the curator, but none to the debtor. The manner of the seizure is thus stated by the Clerk of the Court, who was

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examined as a witness: "In 1849 a gentleman entered the office and introduced himself to witness, calling himself *Smith*, and requested witness to show him the papers in the suits of *Josiah* and *David Stanborough v. Dugall McCall*. Witness showed all the papers to *Smith*, and explained everything in relation to them as well as he could. *Smith* then asked witness if the papers which he then held in his hand belonged to the two suits? Witness replied that they were all the papers. *Smith* then said, 'I levy on these suits as United States Marshall.' Witness told him that he could not take them away, as they were the records of the Court. *Smith* then said he had *R. C. Stockton's* instructions, and would have to follow them. Witness then remonstrated with him, and proposed to *Smith* to envelope the suits, direct them to him, and deposit them in the Recorder's office, with the understanding that *Smith* would examine the law, and see if he had any authority to take the papers away; and if he found he had no authority, he would return them; and if he had authority under the law to make the seizure, and take them into his possession, he was to do so. The notes of the two suits and protests were then enveloped and sealed, directed to '*Smith, United States Marshall*,' and witness and *Smith* went together to the Recorder's office, where they were deposited, the Clerk retaining the balance of the papers in the two cases." The Marshall then advertised the notes and judgments for sale, and at the sale *Stockton* bought them.

We consider these proceedings of the Marshall as a gross and unprecedented disturbance of the Clerk in the performance of his official duties, as custodian of the records of the Court, and as conferring no title upon *Stockton*, at whose instigation, it seems, they were had, and who purchased under them. It is clear that the Marshall had no right to take the notes without a previous order from the District Court, in whose custody they were; and the other acts done by the Marshall were insufficient to effect a seizure and form the basis of a sale. See *Hanna v. Bry*, 5 Annual, 656. See, also, *Price v. Emerson*, 7th Annual, p. —.

Judgment affirmed, with costs.

URILDA SMITH v. BLOIS AND OTHERS.

Blois leased a warehouse from plaintiff, in which were certain goods bought by him. He transferred these goods to his vendor in part payment of the price, who sold them to other parties. Plaintiff sequestered the goods, and claimed upon them the lessors privilege. *Held*: that, as the transfer by the lessee, and subsequent sale by his vendor, took place before there was any default by the tenant to pay his rent, and before any action taken by the landlord, the lessor had no privilege.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Labatt*, for plaintiff and appellant. *Gedge* and *Bright* for defendants.

SLIDELL, J. The object of this action is to rescind a transfer of certain merchandize made by *Blois*, the plaintiff's tenant, to the vendor of the goods. At the time when this transfer was made, *Blois* seems to have been in embarrassed circumstances. The goods were in the warehouse leased by the plaintiff to *Blois*; they were delivered from the warehouse to the vendor, who credited their value upon the debt due to him by *Blois* for their price, and afterwards sold the goods to another person. All this took place before there was any default by the tenant to pay his rent, and before any action taken by the landlord.

Under the above circumstances we think the revocatory action was properly

dismissed. The case appears to us to be covered by the decision in *Walden v. Parish*, 7 Rob. 245. See also Civil Code, 2675, 2679, 3230, 2539.

SMITH
v.
BLISS.

Judgment affirmed; plaintiff to pay costs of appeal.

8	11
Case 1	
118	280

SUCCESSION OF EDWARD C. MIELKE.

A slave was inventoried as the property of the succession of Mielke. The curator of the succession took a rule on the slave, and on Hutchinson, who held the slave in possession, to test the condition of the person claimed as a slave, and the right of possession of Hutchinson. Hutchinson excepted to the proceeding by rule. *Held*: that there is no warrant in the law for the mode of proceeding adopted by plaintiff. His remedy is by an action.

A PPEAL from the First District Court of New Orleans, *Larue, J. Mott & Fraser* for plaintiff and appellant. *Marr & Tappan* for defendants.

Eustis, C. J. The appellant, *H. R. W. Hill*, was appointed by the Court of the First District of New Orleans, curator of the succession of *Edward C. Mielke*, deceased. A certain female slave named *Sarah Haines*, was inventoried as belonging to the succession, and appraised at the sum of five hundred dollars.

At the instance of the appellant a rule was taken on the slave, and on *Charles G. Hutchinson*, as guardian of *Constance Mielke*, and in his own right, to show cause why the said slave should not be delivered up to him as the property of the succession.

In this way the appellant sought, it seems, to test the condition of the person claimed as a slave, and the right of possession of the respondent *Hutchinson*, who excepted to this mode of proceeding.

The District Judge discharged the rule, and from this decision, an appeal is taken.

There is no warrant in the law for the mode of proceeding adopted by the appellant. His remedy is by an action. *Baker & Doane*, 3 Annual Rep., 434. We have, on some occasions, adjudicated upon matters in litigation in the form of a rule and answer, under the consent of parties, when the form of proceeding would hardly justify it, in order to terminate matters submitted to us. It is obvious, however, that any mode of proceeding which does not carry with it the elements of *res judicata*, ought not to be encouraged by Courts, and that alone ought to be followed which conforms to the law of actions.

The judgment of the District Court is, therefore, affirmed with costs.

EDMOND M. GOULD v. GARDNER, SAGER & Co.

8	11
106	216

Action for malicious arrest in a civil suit. Defendant's counsel asked the Court to instruct the Jury—

1. "That in order to enable the plaintiff to maintain this action against the said defendants, it is necessary for him to prove malice; or that the arrest complained of was made, or procured to be made by the said defendants from malicious motives, and without probable cause.
2. That if the Jury believed from the evidence that the said defendants in making or procuring said arrest, acted under the advice of counsel, given in good faith, and believed at the time that they had a good cause of action against him, the said *Gould*, and a legal right to hold him to bail therefor; that they, the said defendants, are not liable in damages to the said plaintiff in this action. The Court refused so to charge the Jury. *Held*: that the Court erred.

A PPEAL from the Fourth District Court of New Orleans. *Strawbridge, J. Hunton & Bradford*, for plaintiff. *Grymes*, for defendants and appellants.

GOULD
v.
GARDNER, SAGER
& Co.

Plaintiff's counsel cited C. C. 1928, § 3, 2294, 1295. *Escuriz v. Daboval*, 18 L. R. 90. *Keman v. Chamberlin*, 5 Rob. 116. *Edwards v. Turner*, 6 Rob. 382. *Grymes* for defendants cited *Snow v. Allen*, 1 Starkie's Rep., 2d ed. E. C. L. Rep., 191. *Silversides v. Bowley*, 1 Moore, 92. *Ravinger v. McIntosh*, 3 Bar. & Cress, 693. *Spencer v. Jacob*, 1 Moo. & Mal., 180. *George v. Rudford*, 3 Carr & Payne, 464.

DUNBAR, J. This is an action for damages for a malicious arrest in a civil suit. The case was tried by a Jury, and there was a verdict and judgment for eight thousand nine hundred dollars against the defendants, who have taken this appeal.

On the trial of the cause, the defendants by their counsel moved the Court to instruct the Jury, "First. That in order to enable the plaintiff to maintain this action against the said defendants, it is necessary for him to prove malice, or that the arrest complained of was made or procured to be made by the said defendants from malicious motives, and without probable cause. Second, That if the Jury believed from the evidence that the said defendants in making or procuring said arrest, acted under the advice of counsel given in good faith, and believed at the time that they had a good cause of action against him, the said Gould, and a legal right to hold him to bail therefor, that they, the said defendants, are not liable in damages to the said plaintiff in this action." Which instructions the Court refused to give, but charged the Jury, "That the law as laid down by defendants' counsel would be correct if the common law prevailed in this State; but the Civil Code is our rule of action, and by that malice is not essential to sustain an action for damages. Malice may be an ingredient in the wrong to heighten, or to diminish the damages; but the rule is that every act of man which causes damage to another, obliges him by whose fault it happened to repair it." Every act, "not every malicious act, but every act, acts of carelessness without malice, errors without malice, are causes of damage under the Civil Code. Merlin title *Quasi Offences*. Of the amount of damage the Jury are the exclusive judges, and the damages are not confined to mere monied loss. Civil Code, Art. 1928. That the man who undertakes a law suit does it on his own responsibility and at his own risk; the advice of the counsel he may select, cannot screen him from the consequences."

In the case of *Sénécal and another v. Smith*, 9th Robinson, 240, our predecessors held that in cases of this kind it is well settled that malice and the want of probable cause in the original action, are essential ingredients. Malice may be expressly proved, or it may be inferred from the total want of a probable cause of action; but malice alone, however great, if there be a probable cause upon which the suit or prosecution is based, is insufficient to maintain an action in damages for a malicious prosecution, and referred to numerous authorities in support of that position.

This Court decided in the case of *Hugh v. New Orleans and Carrollton Railroad Company*, 6 Annual, 495, "That the dispositions of Art. 2294 are found in the Roman and Spanish laws; so far from being new legislation, that article embodies a general principle as old as the science of jurisprudence itself, and it must still be understood, with the limitations affixed to it by the jurisprudence of Rome and Spain. Domat, Lois Civiles, tit. *Damages causés par des fautes*, p. 180, parag. 1."

Upon a rehearing in the same case this Court said, "The Art. 2294 of our Code provides that every act whatever of man that causes damage to another, obliges him, by whose fault it happened, to repair it. The provisions of this Art. however general and comprehensive its terms may be, are found more

than once recited in terms equally general and comprehensive in the laws of the fifteenth title of the seventh *Partidas*. The article was inserted in the Code of 1808, at a time when the Spanish laws were in force. It was put and retained to this time in the Code not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a Code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory whether it was formally enacted in a Code, or not."

GOULD
&
GARDNER, SAGER
& Co.

It appears that the defendants in this case were not without probable cause for the arrest of Gould. They acted by the advice of eminent and learned counsel, whose opinion was formed upon a decision of that distinguished jurist, the late Judge Martin, in the case of *Abat v. Robetaille*, 4th Louisiana Reports, 226, which for about twenty years had been considered as the proper construction of the law of arrest, until overruled by a decision of this Court in this very case of the arrest of the plaintiff *Gould*, reported in 5th Annual, 353, *Gardner, Sager & Co. v. O'Connell and Gould*, upon which this action is based. Although we still adhere to our decree in this last mentioned cause, yet there can be no doubt under the circumstances and previous decisions, that the defendants had in their action probable cause for the arrest of *Gould*.

In an action for a malicious suit in the case of *Wm. Stone v. Asa Swift, Jr.*, 4th Pickering's Reports, 389, the Supreme Court of Massachusetts directed that the Jury would settle the fact, whether *Swift* (the defendant) acted *bona fide* in regard to the consulting of counsel, and believed that he had a good cause of action, and honestly pursued the advice and direction of his legal adviser, or otherwise. If he did, this action could not be supported; if he did not, it might be maintained, and the Jury would assess the proper damages.

The question in the present case is not whether the defendants had a probable cause of action; that has been placed beyond doubt by the judgment obtained in their favor against *Gould* for the whole of their demand against him; but whether they had probable cause for the arrest; and we have already said that they had. In the case of *Foshay v. Ferguson*, 2 Denio, 619, the Court said, "There was evidence enough in the case to warrant the Jury in finding that the defendants set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is not enough, without showing also the want of probable cause. Probable cause has been defined a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made."

Our Codes and Statutes have not provided any rules to guide us on the trial of such actions, and we are governed, in the absence of positive legislation, by the rules laid down in the authorities quoted, because we consider them just and reasonable in themselves. We therefore think that the District Judge erred in not giving to the Jury the instructions asked for by defendants' counsel, as before stated in this opinion, and for that reason remand the case for a new trial. It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed, and a new trial granted, with instructions to the Judge to charge the Jury in conformity to the principles set forth in this decree, and that the plaintiff pay the costs of this appeal.

JOHN PERKINS, JR. *v.* MARY E. POTTS, his Wife.

8	14
106	116
8	14
112	895

No separation of husband and wife can be decreed for cause of abandonment without a compliance with Article 148 of the Code.

The law presupposes the possibility of a reconciliation between husband and wife, and its policy is to bring them together again.

Vague and general allegations cannot support a petition in an ordinary civil suit. The cause of action—the object of the demand and the nature of the title, must be stated with such certainty as to apprise the defendant of every circumstance necessary to put him on his just defence, and to bar a subsequent investigation of matters once decided. A party can be permitted to derive no advantage from the obscurity, or generality of his allegations.

Sound policy requires that there should be no relaxation of these rules, especially in proceedings of this kind, which involve the fate of individuals, and the most important interests of society.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. A. N. Ogden and Suml. R. Walker*, for plaintiff and appellant. *H. H. Strawberry*, for defendant.

EURRIS, C. J. This appeal is taken from a judgment of the Fifth District Court of New Orleans, dismissing the plaintiff's petition.

The plaintiff has brought this action for the purpose of obtaining a decree of separation from bed and board from the defendant, his wife.

The defendant is absent and an attorney was appointed to represent her.

The District Judge considered that the only ground for a separation on which this action was based, was that of abandonment on the part of the wife, and that the proceedings required by the 148d Article of the Code not having been followed by the plaintiff his action failed.

This article provides that the abandonment with which the husband or wife is charged must be made to appear by three reiterated summonses made to him or her from month to month, directing him or her to return to the place of the matrimonial domicile and followed by a judgment which has sentenced him or her to comply with such request, together with a notification of said judgment given to him or her from month to month for three times successively. The summons or notification shall be made to him or her at the place of his or her usual residence, if he or she lives in the State, and if absent, at the place of residence of the attorney who shall be appointed to represent the absentee.

The law presupposes the possibility of a reconciliation of the parties, and its policy is to bring them together again. We concur with the District Judge in the opinion that no separation can be decreed for cause of abandonment without a compliance with the requisites of this article.

It is insisted by counsel that this cause of abandonment is not the only one alleged in the petition.

The petition charges that the plaintiff whose domicile was in New Orleans, was married in New York to the defendant in 1850, that the marriage was contracted with a view to make Louisiana their permanent place of residence, that shortly after marriage the parties sailed for Europe, and while residing in Paris, his wife, without any cause, abandoned their common dwelling and concealed herself from the petitioner for the space of six weeks, and that since her desertion she has removed to and resides with her father in the city of New York. The petition contains allegations of kindness and affection on the part of the husband and the failure and refusal on the part of the defendant to perform the duties incumbent on her as a wife; that her desertion, her conduct and her treatment of him has been cruel and unjust to him to such a degree as to render

their living together as man and wife insupportable, unadvisable and impossible. But with the exception of the abandonment, no acts of the wife are stated, no facts alleged in the manner in which they can be adjudicated upon. This proceeding against an absentee for the purpose of dissolving a marriage is of the gravest possible character, and we think the judge was right in refusing to act on any portion of the petition, except that which contained a cause of action exhibited in a legal form.

Vague and general allegations cannot support a petition in an ordinary civil suit. The cause of action, the object of the demand and the nature of the title, must be stated with such certainty as to apprise the defendant of every circumstance necessary to put him on his just defence, and to bar a subsequent investigation of matters once decided. A party can be permitted to derive no advantage from the obscurity or generality of his allegations. The allegations of the petition are all of that character, except that relating to the abandonment, and not sufficient to put the defendant on her defence.

Sound policy requires that there should be no relaxation of these rules, especially in proceedings of this kind, which involve the fate of individuals and the most important interests of society.

There is no proceeding in the Ecclesiastical Courts in England in cases of this kind without a proper statement of the facts charged. Not that the case should be loaded with supernumerary circumstances, but it is always required that the charge should be made in such a form as to apprise the party of the facts intended to be established. 1 Haggard, 738, note *Popkin v. Popkin*. 8 English Ecclesiastical Reports, 325. *D'Aguilar v. D'Aguilar*, id., 329. 1 id., 200.

The same practice prevails in France and none other is tolerated by the Court of Cassation. Sirey, 6, 2, 572; id., 7, 2, 907. Id., 6, 2, 528; id., 11, 2, 243. *Journal du Palais*, 14, 391.

The judgement of the District Court is therefore affirmed with costs.

PERKINS
C.
POTTS.

GEORGE BISCHOFF v. GASPARD THEURER.

T. sued his wife for a separation from bed and board, and in the same action sought to have annulled certain notes which he alleged had been given by him to her without consideration. He made B., who held the notes, a party, and charged that B. had notice that the notes were given without consideration. Subsequently B. sued T. on the notes, and T. pleaded *lis pendens*; *Held*: That the plea was good.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Schmidt*, for plaintiff. *Dufour*, for defendant.

Rost, J. In this case, the plea of *litis pendens* must be first noticed.

The defendant being sued upon three promissory notes made by him payable to his own order, pleaded in *limine litis*, as an exception, the pendency of another suit between the same parties, and for the same cause of action in a court of concurrent jurisdiction, which plea was overruled by the Court.

The action pleaded in bar to this suit, was instituted by the defendant against his wife, for a separation from bed and board, and also to annul the notes sued upon, on the ground that he had originally given them to his wife, without consideration, and that if the donation had been valid, his wife's misconduct and ingratitude entitled him to have it revoked.

BISCHOFF
v.
THEURER.

The plaintiff and the house of *Dufour, Durand & Co.* were also made defendants, and the prayer against them was that they be compelled to return the notes, on the ground that they acquired them in bad faith. Of the merits of that controversy we know nothing, but we have no doubt of the right of the defendant, to plead the want of consideration of the notes, and the bad faith of the holder, as he has done, and if the defendants in that suit fail to falsify those pleas, and the case should be decided in his favor, the judgment there rendered, would form the thing adjudged, in the present litigation. Under the view we took in the case of *Dick et als. v. Gilmer*, administrator, 4 Ann. 520, this is the proper test of the exception of *litis pendente*.

This case does not materially differ as to facts from that of *Kline v. Freret*; the plaintiff *Kline* had brought suit on promissory notes given for land, the defendant pleaded the pendency of another suit in a Court of concurrent jurisdiction, brought by him to annul the sale and recover back the price, on the ground of fraud.

The plea was sustained by the District Court, and on appeal the judgment was affirmed. 5 Ann. 494. C. P. No. 385.

We are of opinion that the District Judge erred in overruling the exception.

It is therefore ordered that the judgment be recorded and the petition dismissed. It is further ordered that the plaintiff pay costs in both Courts.

SAME CASE ON A REHEARING.

Schmidt, for plaintiff, filed the following argument for a rehearing :

The facts of the case show : That the petition of *Theurer* against his wife, mother-in-law, *Dufour, Durand & Co.* and *Bischoff*, was filed in the Second District Court of New Orleans, the day preceding the plaintiff's filing of his petition in the Fifth ; but that the copy of that petition and citation did not issue till the day after the issuing of plaintiff's petition and citation.

It may therefore be well contended, that plaintiff's suit was first in order of date since citation is the judicial action of the tribunal, and until it issues, there is no evidence that the Court intends to entertain the cause. Citation is in all cases the judicial commencement of a suit, and the mere filing of a petition has never been considered as such, inasmuch as the latter is the mere act of the party, while the former is the act of the Court, giving its official sanction to the act of a private individual. This principle is elementary and recognized in all systems of pleading.

Let us, however, suppose for argument's sake, that this principle has been discarded in Louisiana, and look to its Code of Practice as our guide, and we will there, I think, find principles of law laid down for the government of cases of this kind, equally plain, and which have been disregarded, or misunderstood in this instance.

The plea of *lis pendens* is a declinatory exception ; and exceptions of this kind, which retard the trial of the merits of a cause, are never favored in law. They are therefore to be judged of strictly, and unless they conform in every respect to the letter of the law, they will not be listened to.

To maintain the plea of *lis pendens*, the following circumstance must concur, viz :

There must be another suit *pending* ;

1st. between the same parties ;

2d. for the same object, and growing out of the same cause of action, and

3d. before a Court of concurrent jurisdiction.

But in this suit, I have already shown that the suit of *Theurer* cannot be considered as *pending* when the present suit was brought, as no citation had issued. But be this as it may ; the suit of *Theurer v. his wife and others* was not a suit between the same parties, and no decision of any tribunal can make it so.

In the next place, the cause of action was not the same, unless a suit for the payment of negotiable notes be identical with one for divorce, &c., which will hardly be contended.

The above facts show conclusively, *that the judgment of the Court is contrary to law.*

I now proceed to prove it contrary to principle.

The objects which all systems of pleading aim to attain, are two-fold, viz :

1st. The reduction of the controversy to a few single facts ;

2d. The saving of time and expense to the parties litigant. See Carré, Boncenne, Stephens, Lawes, Story, etc., passim.

Hence, every effort of a defendant to retard the final decision of a cause is looked upon unfavorably.

In this cause this principle is recognized and invoked, although in practice entirely disregarded ; for it is obvious, that by sending us to the Second District Court to await the trial of a complicated controversy involving questions of adultery, &c., we are dependent on our co-defendants, and the final decision of the cause much protracted, while the contrary would be the case, if sent to the Fifth District Court. Besides, we have a right to have this cause tried summarily, and without the intervention of a jury, of which privilege we are also deprived, contrary, as we believe, to the spirit and intention of the law.

Having thus shown the judgment *contrary to law and erroneous in principle*, I now proceed to show that it is against all precedent.

This plea of *lis pendens* was known to the Roman law, and exists in France, and from the systems of jurisprudence in Rome and France, we may obtain some aid in its correct application. In referring to these sources, the Court will find, that it is not the mere filing of a petition which constitutes the *lis pendens*, for Voet says : "*Capta autem esse, atque ita pendere lis alicubi censetur, non modo si litis contestatio jam facta sit, sed sola citatio, sen in jus vocatio.*" *Ad Pandectas*, book 44, tit. 2, No. 7. See also Boncenne, vol. 2, p. 64.

In France, the same question has been frequently decided, and the Court of Cassation of France, in the case of *Guillot v. Reculot*, determined 1st July, 1817, that, "*Il n'y aurait pas litis pendance si les affaires pendantes devant divers tribunaux, &c., ne présentaient pas identiquement les mêmes difficultés.*"—*Journal du Palais*, vol. 14, p. 320.

In the case of *Hampton v. Barrett*, 9 L. 338, 12 L. 159, the Supreme Court held, "that the pendency of a suit for one installment in a Court of concurrent jurisdiction, in which it was sought to rescind the sale, and consequently annul all claim for another installment, could not debar plaintiff from suing in another Court for the second installment.

The above reasons and authorities justify, in the opinion of the undersigned, the application for a rehearing, since they show, that the judgment is contrary to law, principle and precedent.

Dufour, for defendant. There has never been any question as to the service of the citations in both cases. There was such a difference in point of dates, that no question could be raised thereon with propriety.

I regret that professional gentlemen should labor to mislead the Court on this simple point of fact.

The annexed certificate of the clerk of the Second District Court shows :

1st. That the defendant's petition in suit No. 5201, was filed on 5th April, 1852 ;

2d. That the citations were issued on the 7th April, 1852, received by the Sheriff on *same day*, and served on *SAME DAY* upon *Bischoff* and the other defendants ;

3d. That the writ of injunction was also served on the *same day*, viz : 7th April, upon *Bischoff* in person.

On the other hand, the record in the present case shows that *Bischoff's* petition was filed on the 6th April, 1852, that is to say, *one day after* the defendant's petition in the Second District Court.

And further, that the citation was served on *Theurer* on the 10th of April, 1852, that is to say, *THREE DAYS* after service in the case already pending in the Second District Court.

After this authentic statement of facts, the Court will surely stare at the boldness of the asseverations made in the name of *Bischoff*.

The Court is, in conclusion, respectfully informed that the case pending in the

BISCHOFF
v.
THEURER.

BUSHOFF
v.
THURMAN.

Second District Court, is ready for trial ; but the Judge has signified his desire to await for the final action of this Court in the present case, before taking it up for trial.

Eustris, C. J. It is ordered, adjudged and decreed that the judgment rendered by this Court, on the 6th December last, be maintained.

FRANÇOIS JURE v. N. BALLATIN.

Sheriff sequestered live stock. The question being what allowance he should receive for keeping them. *Held*: The stock was kept in a pasture, and if any feed was given, there is nothing to shew the quantity and cost of it ; besides this, it is shown that at the time of the sequestration the cows gave the defendant from forty to forty-five gallons of milk per day, for which sheriff does not account. His claim was therefore reduced.

APPEAL from the District Court, Second District, Parish of St. Bernard, *Rousseau, J. Collins*, for plaintiff and appellant. *Janin & Tayler*, for defendant.

Rost, J. This is a rule taken by the plaintiff upon the sheriff to show cause why he should not pay over the balance of the money made upon the execution in this case and remaining in his hands.

The sheriff claims, and the District Court allowed him, the amount of that balance, say \$341, for keeping the live stock sequestered in the suit during thirteen days and for the taxed costs to which he is entitled.

The plaintiff has appealed from the order discharging the rule.

We have perused the record with great care without discovering evidence upon which the judgment can be sustained. The stock was kept in a pasture, and if any feed was given, there is nothing to show the quantity and cost of it ; besides this, it is shown that at the time of the sequestration, the cows gave the defendant from forty to forty-five gallons of milk per day, for which the sheriff does not account.

We are of opinion that \$200 will be an ample compensation for the risk and expenses incurred by the sheriff and the legal fees to which he is entitled.

It is ordered that the judgment be reversed and the rule reinstated, that the sheriff be allowed \$200 for his fees and compensation in the suit, and that he pay over to the plaintiff the sum of \$140 now in his hands.

It is further ordered, that the defendant in the rule pay costs in both Courts.

FRAME A. WOODS v. WYLIE & EGANA et al.

8 18
121 248

On the dissolution of an injunction staying the execution of a judgment bearing 8 per cent., 30 per cent. damages may be allowed. But a further allowance of 8 per cent. interest, would be giving 16 per cent. interest, which is illegal.

APPEAL from the Sixth District Court, Parish of West Baton Rouge, *Robertson, J. Elam & Herron*, for plaintiff and appellant. *Le Gardeur*, for defendant.

DUNBAR, J. The plaintiff sued out an injunction against an execution in favor of the defendant which had been levied on his property. The District Judge dissolved the injunction and further decreed that *Wylie & Egaña* recover of *Frame A. Woods* and his surety on the injunction bond eight per cent. interest and twenty per cent. damages on the amount of the judgment, the execution of which had been enjoined. Upon referring to this judgment, we find that it also bears eight per cent. interest, which would give together, to *Wylie & Egaña*, sixteen per cent. interest on the judgment and execution enjoined, besides the twenty per cent. damages. Under our laws at present the rate of interest cannot exceed eight per cent. The District Judge therefore erred in awarding any interest in addition to what the judgment enjoined bears. *Aillet v. Henry*, 2 Ann, 146. We think, however, that there was no ground whatever for the injunction and that it was properly dissolved. It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, so far as it allows eight per cent. interest on the judgment enjoined and in all other respects affirmed. The defendants to pay the costs of this appeal.

WOODS
v.
WYLIE & EGANA.

WILLS & RAWLINS v. CASPAR AUCH.

8	19
48	88
8	19
113	1061
8	19
123	691

Under the well-established jurisprudence of this State in relation to sales of land for taxes, no title passes, by a forced sale, under a defective description.

Under the Act of 1847, the Tax Collector is required to give a certificate in writing to the purchaser of lands sold for taxes. *Held*: that so to interpret the act as to make this certificate operate as a conveyance from the State, so as to vest an absolute title in the purchaser, and to establish it as evidence that all the formalities required by the Statute had been complied with, the language of the Statute must be imperative, and free from all ambiguity. Such a power, given to subordinate ministerial officers, would be in derogation of private property, and ought to be construed strictly, and not enlarged by intendment.

All proceedings for the recovery of State taxes are in the name of the State, and whether the conveyance is in the name of the State, or of the tax gatherer, the conveyance is a sanction, and if not a legal one, it can touch no man's property.

APPPEAL from the District Court, Third District, Parish of Jefferson, *Clarke, J. Bonford and Finney*, for plaintiff. *R. N. Ogden*, for defendant and appellant.

EUSTIS, C. J. This is a petitory action for the recovery of a lot of land situated on Rousseau street, between Jackson and Josephine streets, in that part of the city of New Orleans formerly called Lafayette. There was judgment of the District Court in favor of the plaintiff, and the defendant has appealed.

The case turns on the validity of a sale for taxes, made by the Sheriff and Collector of Taxes of the Parish of Jefferson, on the 29th November, 1848, under an assessment for State taxes for the year 1847.

The only description under which this lot was sold, is the following: "Nathan Rogers' property situated in Lafayette, sq. 9-2, lot 63, S. T., 8.53 $\frac{1}{4}$."

On the assessment roll, and in the sale from the Sheriff, the word square is not abridged, but the number is left uncertain as to whether it is 9 or 2, and the defective description is not at all mended.

This lot having sixty feet front on Rousseau street, and valued on the assess-

WILLS & RAWLINS
v.
AUCH. ment roll at \$3200, was sold to the defendant and *William Dalton* for twenty-five dollars. In March, 1851, the defendant bought *Dalton's* interest in the lot for \$600.

Under the well-established jurisprudence of this State in relation to sales of land for taxes, no title passed by a forced sale under such a description. *Jacques v. Klopman*, 6 Annual Reports, 542, and cases there cited.

The plaintiff's claim under an act of sale from *Nathan Rogers*, of date the 17th of March, 1851. The price stipulated is less than half of its assessed value, and the act makes mention of its having been sold for taxes to *Auch* and *Dalton*, and of the purchase of *Dalton's* interest by *Auch*. There is a clause of non-warranty in the act.

There is no objection to the validity of sales of this kind. *Pothier Contract of sale*, 186. We are of opinion that, by this act, the plaintiffs acquired all the interest and title of *Rogers* in the property, and can recover it, if he could recover it, and not otherwise. We are also of opinion that the defendants having acquired *Dalton's* undivided interest in the lot by a subsequent purchase, places him in no better situation in relation to his partner's share than he occupied as to his own, and that, so far as the plaintiffs are concerned, he is to be considered as a purchaser for the whole at the sheriff's sale.

It is admitted that the decisions are against the validity of a sale for taxes under a description like this—but, it is contended that, they were made in cases different in essential particulars from the present case, and under rules widely differing from those established by the act of 1847, which have never yet received the interpretation of this Court.

By the 58th section of this act, p. 175, it is provided that, "The collector shall give to the purchaser of any lands sold by him for taxes, a certificate in writing, describing the lands purchased, the sum paid, and the time when the said certificate shall have the force and effect of a deed." By section 59th of the same act, it is provided, "That the owner or occupant of any land, or any share of any lot or piece of land sold for taxes, or any creditor or agent of the owner, claimant or occupant, may redeem the same any time within two years after the day of sale, by paying to the purchaser, or the Treasurer of the State, for the use of the purchaser, his heirs and assigns, the sum mentioned on the certificate, with interest at the rate of twenty per cent. per annum from the date of such certificate."

And by section 60th, it is provided, "That if no person shall redeem such lands within two years, the said certificate shall, at the expiration thereof, operate in favor of the purchaser, his heirs and assigns, in the name of the State, as a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate, subject to all claims which the State or parish may have thereon, for all taxes or other liens and incumbrances; and such certificate to be a good and valid title after that time, shall be acknowledged, proved and recorded, as all other sales of immovable property at judicial sales, and have the like force and effect."

It is contended that this introduces a radical change in the rules governing tax sales. In none of the former statutes do we find it declared that the sheriff's deed or certificate of sale shall, after a certain lapse of time, have the force and effect of a deed, "and shall operate in favor of the purchaser, in the name of the State, as a conveyance of the real estate, &c., which shall vest in the grantee an absolute estate," &c.; and further, "that such certificate to be a good and valid title after that time," &c.

To give full legal effect to these expressions, it is said, that the Legislature, seeing how futile tax sales had been, and how insufficient former legislation had

proved, and possessing the power to declare what should constitute proof of title in tax sales, determined, in order to correct an evil and an abuse, to enact, that for the future, in all such sales the sheriff, instead of making a deed at the time of sale, should grant a certificate, which, unless the owner redeem his property on prescribed conditions, within two years, should become itself full proof of title, and, *per se*, vest in the purchaser an absolute estate.

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The proceedings under which this lot was sold were against Nathan Rogers as a non-resident proprietor, and his residence is proved to have been out of the State. By the revenue act of 1847 referred to, it is provided, under the title of assessment and duties of assessors, that the lands of non-residents shall be designated in the same assessment roll, but in a part thereof separate from the other assessments, and in the manner *described hereinafter*. Section 25.

If the land be assessed as a tract or lot which is known by a name, or if the owners name be known, they shall designate it by those particulars, and by its boundaries. If it have no name, or the name be unknown, and if the owner be unknown, they shall designate it by *boundaries alone*. Section 26.

They shall set in a separate column the owners name, if known, the description of the tract or lot, and the valuation as directed in the case of other lands. Sect. 27.

It may have been competent for the Legislature, as contended by counsel, to make the certificate of the collector operate as a conveyance from the State, and vest an absolute title in the purchaser, and to establish it as evidence that all the formalities required by the statute had been complied with, and to have limited the time within which a tax sale could have been set aside at the instance of the owner.

The analogy urged in argument between this Act and the Act of 1834, concerning judicial sales, does not maintain itself, for in that Act express provision is made for the evidence and for the limitation. And construing this statute according to the rules established in jurisprudence, in order to give the certificate the effect contended, the words of the law ought to be imperative and free from all ambiguity. Such a power given to subordinate ministerial officers would be in derogation of private property, and ought to be construed strictly, and not enlarged by intendment. Dwarries on Statutes, 750.

We do not think that this part of the Act of 1847 materially changes the jurisprudence on the subject of the validity of tax sales. Nothing can be inferred from the insertion of the authority of the State and the name of the State. All proceedings for the recovery of State taxes are in the name of the State, and whether the conveyance is in the name of the State, or of the tax gatherer, the conveyance is a sanction, and if not a legal one, it can touch no man's property. The statute must be looked to throughout, divested of its verbiage, and construed with reference to the existing laws, and a regard for private right.

There is nothing that we perceive in the facts of this case which will prevent the plaintiffs from recovering. They were the agents of the owner, *Nathan Rogers*, and had their commercial domicile in New Orleans. They collected his rents and paid his taxes in New Orleans and the taxes in this bill. They neglected his business in not paying this tax of 1847, and fearing they might be responsible for their neglect, they bought it. Notwithstanding this, we think their right of property to the lot has not been defeated by the tax sale, or lost by their own acts.

The judgment of the District Court is, therefore, affirmed with costs.

J. B. LEFRETRE et al. v. GENERAL COUNCIL and the THREE
MUNICIPALITIES.

In 1849, a crevasse occurred on defendants' land. Plaintiffs, who lived above and below the land, contracted with James Flemming to have the crevasse stopped, and brought this action to recover the price from the defendants, on whose land the crevasse was. *Held*: That the defendants cannot be held liable for the amount claimed, unless there was an express or implied assent on their part to pay. The crevasse was the result of overpowering force—the act of God, which does nobody harm.

APPEAL from the Fifth District of New Orleans, *Buchanan, J. Lavergne*, for plaintiffs and appellants. *Bayne, for T. R. Wolfe*, for defendants.

ROST, J. In 1849, a crevasse occurred on a tract of land belonging to the defendants, situated on the right bank of the Mississippi River, in the Parish of Orleans.

The plaintiffs, who own plantations above and below that point, entered into a contract with one *James Flemming*, by which they agreed to pay him \$4500 if he succeeded in stopping it. The Police Jury of the parish agreed to pay *Flemming* the additional sum of \$1000 on the same condition.

The plaintiffs now seek to recover from the defendants the amount paid by them under this contract, on the ground that it inured to their benefit, and that, as owners of the land, they are absolutely liable for all the expenses necessarily incurred in closing the breach in the levee. There was judgment for the defendants, and the plaintiffs have appealed.

There is no allegation in the petition that the crevasse occurred through the fault or neglect of the defendants, and the evidence clearly shows that they cannot justly be charged with either. Under that state of facts, the defendants cannot be held liable for the amount claimed, unless there was an express or implied assent on their part to pay. The crevasse was the result of overpowering force; the act of God, which does nobody harm.

The assent of the defendants to pay cannot be implied from the advice given by the Mayor to the plaintiffs, to do for the best, especially when their counsel admits that no instructions were ever given by any city authority in relation to it.

The Act of 1829 relative to roads and levees, relied upon by the plaintiffs' counsel, ceased to be in force in all the parishes bordering on the Mississippi River in 1833. The repealing Act was not brought to our notice in the case of *Deben v. Girod*, and was overlooked by us. 4 Annual p. 30, Sess. Acts 1833, p. 91.

The judgment is affirmed with costs.

VILLERE, FAZENDE et al. v. THE MAYOR AND COMMISSIONERS OF THE
GENERAL SINKING FUND.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Lavergne*, for plaintiffs and appellants. *Bayne, for T. R. Wolfe*, for defendants.

ROST, J. This case rests upon the same principle as that just determined, *Lepretre et al. v. General Council and the Three Municipalities*, No. 2891 of the

docket of this Court. The case of *Williams & Sarage v. Narcisse LeBlanc*, 5 Annual, 125, upon which the plaintiffs rely, occurred in the Parish of Lafourche Interior, where the Act of 1829, concerning roads and levees, was at that time in force. That Act was repealed in 1833, for all the parishes bordering on the Mississippi River, and in those parishes there is no law under which a party can be held liable for labor and materials furnished in stopping a crevasse upon his land, unless the crevasse occurred through his fault or neglect. Acts of 1838, p. 91. The judgment in favor of the defendants must be affirmed.

Judgment affirmed with costs.

VILLERS, FAZENDE
ET AL
C.
THE MAYOR AND
COMMISSIONERS OF
THE GENERAL
SINKING FUND.

DAVID S. RHEA, Testamentary Executor, &c., v. ISAAC S. TAYLOR.

Writ of seizure and sale of property situated in East Feliciana, mortgaged by defendant, who subsequently removed to West Baton Rouge, was issued, and personal service was made by the Sheriff of East Feliciana on the defendant in *E. F. Held*: That the service was sufficient.

The personal service on the defendant in East Feliciana rendered unnecessary a service in West Baton Rouge. Defendant being personally served by a competent officer, within the parochial limits of that officer's functions, could not plead ignorance of the seizure of his property, or that the mortgage debt was demanded of him.

In the absence of positive proof to the contrary, the Court is bound to presume that the District Judge did not issue an order of seizure and sale without the production of the evidences of debt required in such cases.

Service of an order of seizure and sale interrupts prescription.

A PPEAL from the District Court of the Sixth Judicial District, *Burke, J. W. D. Winter*, for plaintiff and appellant. *J. M. & J. E. Elam*, for defendant.

DUNBAR, J. On the 8th of August, 1838, *John Rhea*, of the parish of East Feliciana, whose estate is represented by the plaintiff as his testamentary executor, sold to defendant, then also a resident of the same parish, certain real estate situated there, for the sum of one thousand dollars payable in three equal annual installments thereafter, with ten per cent interest after their maturities, for which the vendee executed his three promissory notes, secured by special mortgage on the property sold. On the 1st January, 1840, a payment of \$160 was made and credited on the note which was then due.

On the 13th November, 1844, the plaintiff obtained an order for the seizure and sale of the mortgaged premises, setting forth in his petition, that the notes above given were all due and unpaid, except the sum of \$160, credited as before stated; that one *John Slater* had become the owner of a portion of the property, the remainder being still owned by the original vendee *Taylor*, who had removed to the parish of West Baton Rouge. On the 20th November, 1844, the sheriff of East Feliciana, to whom the writ of seizure was addressed, gave *personal notice* to the defendant, who was then present in the parish, that unless the debt, interests and costs were paid in five days, he would proceed to seize and sell, etc. On the 25th of same month, personal notice of the seizure of property in *Slater's* possession, was served on him.

The Sheriff's return further states that on the 27th December, 1844, he enclosed a written notice of the seizure of the property to the Sheriff of West Baton Rouge, to be served on *Taylor*; that on the 7th January, 1845, he personally notified *Taylor* to appear, and appoint an appraiser, and that *Taylor* in-

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formed him he would attend to the sale. No return is to be found in the record of service of the notice by the Sheriff of West Baton Rouge. On the 1st March, 1845, the property was sold on a credit of 12 months, and brought \$115 00, a nett credit of \$77 80 on the writ.

On the 21st June, 1847, the present action was instituted to recover from the defendant, *Taylor*, the balance due upon the notes originally given for the property which had been thus seized and sold; and on the 1st July, personal service of the citation was made. To this, the defendant filed a general denial, admitting specially his execution of the notes, but pleading an open account of \$157 43, "in compensation of any amount which may be found to be due the succession." In March, 1852, he filed an amended answer, pleading the prescription of five years.

The Court below sustained the plea of prescription and rendered judgment against the plaintiff, from which he has appealed.

In support of this plea, the defendant's counsel relies—

1st. Upon the want of proof of the service of the notice of seizure and sale by the Sheriff of West Baton Rouge, where *Taylor* resided;

2d. That the mortgage notes were not filed with the petition praying for the order of seizure and sale, and that the order issued improperly upon the production of the act of mortgage alone; and

3d. That even if the proceedings were legal, the order of seizure and sale did not interrupt prescription; cites case of *Harrod v. Voorhies*, adm., etc. 16 Lou. R. p. 254.

As to the first ground of defence, we are of opinion that the personal services made by the Sheriff of East Feliciana, upon *Taylor*, who was then present in that parish, dispensed with service of the same notice by the Sheriff of West Baton Rouge; the object of the law was fulfilled, which requires such a notice to be given to the defendant, by being personally served upon him by a competent officer, within the parochial limits of that officer's functions; he could no longer plead ignorance of the seizure of his property, or that the mortgage debt was demanded of him.

Upon the second ground, an examination of the Record satisfies us that the notes were filed with the petition, which states, "All of which will more fully appear by reference to a duly certified copy of said act of sale, to the above described three promissory notes, and to the certificate of record hereto annexed. Copies in full of the notes are attached to the transcript of those proceedings, which are duly certified by the Clerk, and the Judge's order recites that upon consideration of the petition, affidavit and documents annexed, it is ordered, etc." Moreover, in the absence of positive proof to the contrary, we are bound to presume that the District Judge did not issue his order without the production of the evidence of debt required in such cases; if further proof were wanting, we find it in the receipt of plaintiff's attorney for the notes filed, which is embodied in the transcript of the proceedings under the order of seizure.

The third and last ground of defence is, that the proceedings by the *via executiva*, did not interrupt the prescription. This question received from us an elaborate examination in the case of *Stanborough v. McCall*, 4 An. 322, and has been subsequently affirmed in *Fortier v. Zimpel*, 6 An. 54.

Service was made on *Taylor* of the notice of seizure on the 14th December, 1844, seventeen days before prescription had accrued on the first note of the series. The executory proceedings terminated on the 1st March, 1845, and on the 1st July, 1847, the defendant had notice of the present action. Prescription

had not therefore been acquired. This renders it unnecessary for us to examine how far the defendant's first plea of compensation operated as an admission of the debt.

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It is therefore ordered, adjudged and decreed that the judgment of the lower Court be reversed; and it is further ordered, adjudged and decreed that there be judgment in favor of the plaintiff against the defendant, for the sum of one thousand dollars with ten per cent interest on one third of said amount, from the 8th day of August, 1839, till paid, and like interest on one other third of said sum, from the 8th of August, 1840, till paid, and like interest on the remaining third of said sum, from the 8th of August, 1841, till paid; subject to a credit of one hundred and sixty dollars, as of the 1st January, 1840, and a further credit of one hundred and fifteen dollars, as of the 1st March, 1845; and that defendant and appellee pay costs in both Courts.

JOHN R. SHAW & Co. v. JOHN NOLAN.

The holder of a promissory note bearing five per cent. interest, took a new note bearing eight per cent. interest, payable one day after date. *Held*: The endorser was discharged.

A PPEAL from the Second District Court of New Orleans, *Lea, J. Stanton & Bradford*, for plaintiff. *R. H. Marr and Miles Taylor*, for defendant and appellant.

ROST, J. The petition in this case sets forth two distinct causes of action; one growing out of a contract for a sugar-mill and engine, the other on account of a promissory note made by *Lobdell* and endorsed by the defendant.

It is alleged, that on the 26th day of November, 1845, a contract was made between defendant and *James Goodloe*, of Cincinnati, by which *Goodloe* undertook to deliver to *Nolan*, at his plantation, in West Baton Rouge, a mill and engine of certain dimensions and specifications, to be finished 1st September, 1846; that the said contract was committed to writing by *John R. Shaw & Co.* acting as the agents of the parties for that purpose; that the mill and engine was furnished according to contract; that other machinery was also forwarded, and that *Nolan* was indebted on that account in the sum of \$7,267 47, with interest from 31st March, 1847, and in the further sum of \$208 83, the wages of an engineer; that *James Goodloe* assigned and transferred to plaintiffs, on the 29th January, 1851, all his rights, interest and claims against *Nolan*, under and by virtue of that contract. Plaintiff also avers that defendant is indebted to him in the sum of \$5,000 on account of his endorsement of *Lobdell's* note, which was protested.

The defendant in his answer, insists that the mill and engine were not delivered according to contract; that it was imperfect and defective; and, in consequence thereof, he had sustained damage to a large amount, and assuming the character of plaintiff asks for judgment in his favor for \$30,000. He pleads also, in substance, that he was not, as endorser, liable to pay the said note, because the plaintiff had taken a new note from *Lobdell*, the maker, giving time for the payment.

The District Court rendered judgment against the plaintiff on the note, and in his favor on the contract for mill and engine for the amount demanded, with interest from the day of 1851, and the defendant appealed.

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The claim of the plaintiffs for the mill and engine, and that of the defendant in reconvention, turn upon questions of fact. The District Judge has reviewed the evidence in relation to them, with his usual discrimination and care, and the conclusions to which he has come meet our entire concurrence.

It cannot be seriously insisted that the contract sued upon was not entered into between *Nolan* and *Goodloe*, or that the mill and engine in controversy were not delivered in execution of it. *Nolan*, therefore, owes the price he agreed to pay, unless he establishes, at least partially, his claim in reconvention. On that claim he stands as plaintiff, and it is not enough that he should make his case probable, he must make it certain. We think he has failed to do so.

The machinery is shown to have been made in conformity to the contract and the evidence in relation to the manner in which it was put up, though conflicting, preponderates in favor of the plaintiff. But even if it did not, we could not act upon it, because it would be impossible to ascertain from the other testimony, whether the breakages which occurred were caused by the machinery being put up out of line and out of level, or by overfeeding and other ill usage of the mill, and the unusual length of the cane and bagasse carriers, which *Nolan* required to be attached to the mill, and one of which he has since found it necessary to reduce, so as to be but a few feet in length.

But if all the facts alleged in the defence had been established, the defendant could not recover, because the damages he claims resulting from the loss of a portion of his cane by cold weather, are not shown to have been the necessary consequence of the breaking of the mill. He did not begin to grind until the 28th of November, and it is clearly proved that the delay was not caused by *Goodloe*, and that he finished putting up the mill and engine when *Nolan* permitted him to do so, and long before the sugar-house and bagasse chimneys were ready. There is nothing in the record to justify the belief that if *Nolan* had commenced at the usual time he could not have saved his crop, notwithstanding the accidents which occurred. There is no pretence for saying that the loss on the second crop was the result of defective machinery. The broken parts of the mill were all replaced by *Goodloe* without charge, and it seems now to be in all respects in conformity with the contract. We think it must be paid for.

The note of *Lobdell*, endorsed by the defendant, was protested at maturity for non-payment, and due notice was given to the endorser. More than two years after its maturity, the drawer paid the plaintiffs one thousand dollars on account, and some time after settled with them for the balance and gave them his due bill, payable one day after date, bearing eight per cent. interest from its date, the plaintiffs retaining the original note, until final payment. It is urged, in their behalf, that the taking of this note was not, under the facts of the case, a giving of time for payment, and that if it was, the stipulation was without consideration and therefore void.

Without conceding that the want of an apparent consideration, would be sufficient to avoid a promise to give time, we dissent from these two propositions.

It is settled by the highest authority, that the giving of a new note payable one day after date is giving time for payment, even when the original note remains in the hands of the creditor, and the cases in which this question has been decided differently are not satisfactory to us.

"Thomson on Bills, ch. 6, § 537, 543 (2d edit.) In *Gould v. Robson*, 8 East. R. 576, 579, which was the case of time being given by the holder to the acceptor on a bill of exchange, Lord Ellenborough said: 'How can a man be said not to be injured, if his means of suing be abridged by the act of another? If

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the plaintiffs, holders of the bill, had called immediately upon the defendants for payment, as soon as the bill was dishonored, they might immediately have sued the acceptor and the other parties on the bill. I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time; he may make what arrangements he pleases with the acceptor; but he does that at his peril; and if he thereby alter the situation of any other person on the bill, as to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill: but here the holder did something more: he took a new bill from the acceptor, and was to keep the original bill until the other was paid. This is an agreement, that in the mean time the original bill should not be enforced: such is at least the effect of the agreement; and therefore I think time was given.' "

See Story on promissory notes, page 529.

There was a clear and apparent consideration for the new note in this case. It is made to bear eight per cent. interest, when the original note only bore interest at the rate five per cent. after the protest, and we would infer from the amount acknowledged by *Lobdell* to be due, after the payment he had made, that the interest charged in the settlement exceeded the legal interest. Mr. *Lobdell* is evidently mistaken when he says that the last note was given merely to show the amount of his then existing indebtedness; he did not owe interest at the rate of eight per cent. and the amount of that note exceeds his indebtedness on the original note, after deducting the payment made.

We are of opinion that the defendant is released from his endorsement.

The amount charged for extra work and materials furnished by *Goodloe* to *Nolan*, as well as the transfer of the account and of the sum due under the contract for the mill and engine are fully proved. But we think there is error in the allowance of \$208 83 for the wages paid to the engineer who took off the first crop agreeably to the contract between *Nolan* and *Goodloe*. It was stipulated that the wages should not exceed one hundred dollars per month, and the grinding only lasted thirty-one days. There must be therefore a deduction of one hundred dollars on the judgment.

It is ordered that the judgment be amended so as to be in favor of the plaintiffs and against the defendant for the sum of \$7,371 26, with interest at five per cent. per annum from the 24th of February, 1851, till paid, and that, as amended, the judgment be affirmed, the plaintiffs and appellees paying the costs of this appeal.

A. AND F. REMY v. MUNICIPALITY NO. TWO.

Plaintiffs offered in evidence an instrument purporting to be a will of their father, made before a notary public and three witnesses, for the sole purpose of showing an acknowledgement therein by the testator that the plaintiffs were his natural children. *Held*: That the will was admissible for the purpose for which it was offered, although never probated.

Plaintiffs offered in evidence a transcript of the proceedings of the Second District Court of New Orleans, putting the plaintiffs in possession as heirs of their father. *Held*: That the document was admissible to prove *rem ipsam*.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Durant & Horner, Elmore & King* and *J. Lambert*, for plaintiffs and appellants. *T. R. Wolfe* and *C. Roselius*, for appellees.

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• No. 2.

Durant & Horner, for appellants, contended that the instrument offered in evidence, though not as good as a will, was admissible to show an acknowledgment of the parentage of plaintiffs, and cited *Lartigue v. Baldwin*, 5 Martin, 193. *Breedlove v. Turner*, 9 Mart. 880. *Smoot v. Russel*, 1 N. S. 522. *Fou-gard v. Tourregard*, 3 N. S. 466. *Thompson v. Chateau*, 4 N. S. 461. *Jones v. Read*, 1 Annual, 200.

Roselius, contra, cited *Stewart v. Rowe*, 10 L. R. 533. *Marcos v. Barcas*, 5 A. 265. *Landry v. Duaren*, Ib. 612. C. C. 1637.

ROST, J. This case comes up on a question of the admissibility of evidence, decided adversely to the plaintiffs and appellants in the Court below.

On the trial, the plaintiffs offered in evidence an instrument purporting to be a will of their father, made before a notary public and three witnesses, for the sole purpose of showing an acknowledgement therein by the testator that the plaintiffs were his natural children.

The Court rejected this instrument, on the ground that it was a will and had never been admitted to probate.

We are of opinion that the Court erred. It is true that a will not probated can have no legal effect as a will, and is inadmissible as evidence in support of any claim under the testamentary dispositions it contains. But the plaintiffs' claim is not one of that kind. They claim as heirs at law, and offer the will as a notarial act to prove the acknowledgment of their father that they are his natural children. Had the will been in any other form, a similar acknowledgment in it would have been inoperative. Its legal effect results exclusively from the form of the act and no satisfactory reason has been given to sustain the ruling of the Court below.

In France, a will can only be revoked by a posterior will, or by an act before a notary containing a declaration of the change of intention. It is held there, that a will by public act, void for defects of form, is valid as a notarial act to revoke a previous will, provided it contains a declaration of the change of intention.

The plaintiffs farther offered in evidence, a transcript of the proceedings of the Second District Court of New Orleans putting the plaintiffs in possession as heirs of their father. It was rejected by the Court, on the ground that it was *res inter alios acta*.

We are of opinion that the document was admissible to prove *rem ipsam*.

It is ordered, that the judgment in this case be reversed and the case remanded to be proceeded in according to law, and in conformity with the opinion of the Court.

It is further ordered, that the defendants pay the costs of this appeal.

BARELLI & Co. v. LITTLE & HUNTINGTON.

On a previous trial, this case was remanded because the Court had erred in admitting in evidence a commission taken by a magistrate of the State of Texas, whose official capacity was not properly certified. Subsequently, the commissions and documents were withdrawn and a new certificate as to the magistrate's capacity, in proper form, was obtained and appended. *Held*: That for all the purposes of this inquiry, the commission and documents might be considered as not having been removed.

APPEAL from the Fifth District Court of New Orleans, *Buchanan*, J.

On the trial of this cause, "Plaintiffs offered in evidence all the evidence given by them on the former trial, together with a certificate of the Governor of

the State of Texas, as to the official capacity of *J. R. Baker*, Justice of the Peace."

BARKLI
f.
LYTLE & HUNTING-
TON.

Objection was made to the admissibility of the testimony of *J. T. O'Reilly*, which being overruled, the following bill of exceptions was taken by the defendants:

"BILL OF EXCEPTIONS.

"Be it remembered, that on the trial of this case, plaintiff offered in evidence the testimony of *J. T. O'Reilly*, taken under a certain commission, under an order of this Honorable Court, dated 28th day of February, 1848, to the reception of which in evidence, *B. W. Huntington*, by his counsel, objected, on the grounds following, to wit:

1st. That the return of said commission is not properly authenticated, for the reasons set forth in the Bill of Exceptions taken by the defendant on the former trial of this cause, dated the 19th of January, 1849, and which reasons are sustained by the opinion and decree of the Hon. the Supreme Court. This said decree of the Supreme Court determines said testimony to be illegal, and the same ought therefore to be rejected;

2d. That there is no order of Court directing any new commission to any Judge, Justice of the Peace, or other commissioner in the State of Texas, subsequent to that ordered on the 28th February, 1848, and that the return of a commission which has been decreed to be inadmissible in evidence, as not being properly authenticated, in order to have its defects supplied by a new authentication, is not good evidence in law, when, as in the present case, there has been no new order directing another, or the same commission to issue, and when the same commission has never left the files of the Court; and when there has been no service of the interrogatories made upon the defendant, or other opportunity given him to cross such interrogatories; that the return to the commission now offered in evidence, has been pronounced illegal testimony, and is *res judicata*; and that if plaintiffs desired to take *O'Reilly's* testimony, they should have issued a new commission, and cannot supply the defects of the first by simply obtaining a certificate such as that offered in evidence on the 1st of May, 1851, without any order of Court authorizing an application for the same, and by a proceeding *ex parte* and *in pais*.

3. That said commission ought not to be received in evidence for the reasons set forth in the Bill of Exceptions, dated 17th January, 1849, and which reasons are now again urged as objections thereto.

But the Court overruled the objections," etc.

Joseph, for plaintiff. *W. D. Hennen*, for defendant and appellant.

Eccles, C. J. This appeal is taken from a judgment of the Court of the Fifth District of New Orleans, by which the defendant, *Huntington*, is condemned to pay the plaintiffs the sum of one thousand and twenty-five dollars with interest.

This case was before this Court in November, 1849, on an appeal of the defendant, and was remanded for a new trial on a bill of exceptions taken by him to the admission in evidence of a commission taken in the State of Texas, on the ground that the certificate of the Governor under the seal of State, did not establish the official capacity of the magistrate executing the commission at the time of its execution, the terms of the certificate relating to his capacity at the time of its being granted and not to an anterior period. 4th Annual Rep. 557.

It seems that the commission and documents were withdrawn by the plaintiff's attorney, and have been returned with a new certificate, under the great seal of Texas, certifying that *John R. Baker*, before whom the deposition purports to have been taken, was a Justice of the Peace at the time of the execution of the commission, to wit: on the 5th June, 1848.

We think it is an answer to the objections taken by the counsel, founded on the irregularity of the removal of the commission and documents from the files, that for all the purposes of this enquiry, they may be considered as having remained there and not been removed.

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The new certificate of the Governor establishes the official capacity of the magistrate; it certifies that *John R. Baker* was a duly authorized Justice of the Peace in and for the county of Calhoun, State of Texas, at the time of the execution of the commission. *Baker*, the commissioner, executes the commission in that capacity and so signs himself in a return. His signature is not drawn in question in the bill of exceptions. This is a sufficient authentication of the official capacity of the magistrate, under the authority of *Thacker v. Goff*, 13 Louisiana Rep. 362.

The judgment of the District Court is, therefore, affirmed with costs.

MORGAN W. BROWN, Guardian of MARY McNEIL, a minor, v. JOHN S. CROCKETT, LUCINDA CROCKETT, and EDWARD CHAPMAN, and ESTHER CHAPMAN, his wife.

By the Statute of Tennessee, a testamentary guardian may maintain an action of ravishment of ward, or trespass against any person who shall wrongfully take away, or detain the person of the ward, and may recover damages for the same in such action for the benefit of the minor.

The tutor of a minor, deriving his authority from the law of their common domicile, has a right to exercise his personal actions everywhere.

By the Statute of 1848, guardians of minors residing in other States of this Union, and duly appointed and qualified in such States, are entitled to sue for and recover any property, rights, or credits belonging to such minors within this State, upon producing satisfactory evidence of their appointment, without being under the necessity of qualifying as tutors according to the laws of Louisiana.

A will admitted to probate in another State, and nominating a guardian to the minor heirs, and who has been duly recognized there, need not be probated in our Court, to allow the guardian to maintain an action for the wrongful abduction of his ward.

Under the law of Tennessee, the father of a minor child has a right by last will and testament to name a guardian for her.

A married woman is liable in damages to the injured party for any offence (*délit*) committed by her, and she is not relieved from liability by the fact of her husband's presence, or concurrence.

In an action for the wrongful abduction of a minor, the jury has a right to consider the mental pain inflicted upon the child as a legitimate subject of amend.

The testimony of the plaintiff—suing for the benefit of the minor, and who has no pecuniary interest in the event of the cause, was admissible. The objections would go only to his credibility.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Finney and Benjamin & Micou*, for plaintiff. *Grymes*, for defendant and appellant.

As to the right of plaintiff to maintain the action, plaintiff's counsel cited Acts 1843, 97. *Burbechaux v. Burbechaux*, 7 L. R. 43. 8 L. R. 88. *Bailey v. Morrison*, 1 An. 523. *Johnson v. Runnels*, 6 N. S. 622.

As to the jurisdiction of the Court below for a tort or trespass committed in Tennessee, *Homes et al. v. Barclay et al.* 4 An. 63.

As to the liability of a married woman for a tort or trespass: Dalloz, Dictionnaire de Jurisprudence, vol. 4, verbo *Responsabilité*, Nos. 495 to 509. Marcadé, Cours de Droit Civil, 286 liv. 3, tit. 4, art. 1384. 2 Roper on Husband and Wife, 127. Civil Code 2304, and Revised Statutes 151, sec. 31.

As to the competency of plaintiff as a witness, 1 An., 227. 2 An., 1017.

SLIDELL, J. The plaintiff in his capacity of testamentary guardian of *Mary McNeil*, a minor, sues for the benefit of his ward, for damages for a wrongful abduction of her person, and various personal wrongs suffered by her at the hands of the defendants. There was a verdict against the defendants *in solido* for \$3,000, and from a judgment rendered thereon the defendants have appealed.

Much of the argument for the defence was directed to the right of the plaintiff to bring this action.

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If the plaintiff was the lawful guardian of *Mary McNeil*, we have no doubt that under the law of Tennessee he was the proper person to bring suit for her benefit, and recover damages for injuries inflicted upon the person of his ward, or any violations of her personal rights. Indeed there is in evidence a statute of that State which is directly applicable to the case, and by which it is provided that a testamentary guardian may maintain an action of ravishment of ward, or trespass, against any person who shall wrongfully take away, or detain the person of the ward, and may recover damages for the same in such action for the benefit of the minors.

With regard to the right of the plaintiff to bring this action for damages in the tribunals of this State, we entertain no doubt. In *Burbechoux v. Burbechoux*, 7 Louis. 547, it was recognized as a well settled principle that the tutor of a minor, deriving his authority from the law of their common domicile, has a right to exercise the personal action of his pupil everywhere. By the Statute of 1843 it was enacted, that guardians of minors residing in other States of the Union, and duly appointed and qualified in such States, shall be entitled to sue for and recover any property, rights or credits belonging to such minors within this State, upon producing satisfactory evidence of their appointment, without being under the necessity of qualifying as tutors according to the laws of Louisiana.

Under both systems, such injuries to the person of the ward, as are alleged to have been inflicted in this case, creates a right to damages, which, when recovered, enure to the benefit of the ward; and under both, the actions for their recovery may be maintained by the guardians appointed in conformity to the law of the minors' domicils.

We see no difficulty in the objections that the plaintiff claims to be guardian under the will of his ward's father, and that the will has not been probated in this State. Under our statute and jurisprudence, the right to maintain the present action depends not upon the particular source of the authority of the foreign guardians, but upon its lawful existence at the place of their domicile.

This brings us to the inquiry, whether the plaintiff is really invested, under the laws of Tennessee, the domicile of the minor and his own, with the office of guardian. And upon this point we entertain no doubt. It is abundantly established by the evidence that under the law of Tennessee the father of the minor had a right by last will and testament to name a guardian for her; that he exercised that right by naming the plaintiff; that his will was duly probated in 1844; that such probate was, under the then existing law, the only step necessary to confer the right of guardianship upon the plaintiff so named; that he immediately accepted the trust, received the custody of the minor's person, and was the only person from that time to this, who under the law of Tennessee was the lawful guardian of the minor. It is true that under certain judicial proceedings, in evidence in this cause, it appears that he was ordered by a court in Tennessee to give security for his administration, a duty which under the laws in force at the time when he entered upon the guardianship, was not incumbent upon him; but there is nothing in the evidence to establish a divestiture of the guardianship; and the order to give security has been complied with.

We pass, therefore, to a consideration of the fact of the abduction, upon which depends the question whether the assessment of damages made by the jury, and which the District Judge refused to disturb, has done injustice to the defendants.

Mary McNeil is the daughter of *Dr. Wm. McNeil*, formerly a resident of Nashville, where he died in 1844. He left two children, *Mary*, then about ten

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years of age, and her brother *William*, about three years younger. By his will he directed his whole estate, with the exception of a small portion, to be divided between them, and nominated his friend, *Morgan W. Brown*, their testamentary guardian. The fortune thus left to the minors amounted to about \$150,000. On his death-bed he earnestly requested *Judge Brown* to accept the guardianship of of his children, and informed them that he had committed them to *Judge Brown's* care. Soon after his death the will was probated, *Judge Brown* accepted the guardianship and entered upon the discharge of its duties. The children were taken into his family, received from his wife and himself the most sedulous care, and were treated by them in the same manner as their own children. They have always received all the advantages of education suitable to their condition, appear to have regarded their guardian and his wife with filial affection, and to have been entirely contented and happy under their care. These facts are substantiated in the most satisfactory manner by witnesses of unquestioned standing and credibility, who lived at Nashville, and were well acquainted with *Judge Brown* and his family. One of these witnesses, *Mr. Justice Catron*, a member of the Supreme Court of the United States, besides attesting these facts, deposes as to the intimacy and great mutual regard which existed between the father of *Mary* and her guardian, and his suitability for the charge entrusted to him. Other witnesses living in Nashville, who appear to be equally entitled to credit, concur in this estimate of his character and qualifications.

McNeil appears to have left no blood relations except his two children; and the nearest blood relations they have, so far as the evidence informs us, are the defendants in this suit, *Mrs. Chapman*, *Miss Lucinda Crockett* and *Dr. Crockett*, their natural aunts and uncle.

Since the death of the tutor various efforts have been made in the courts of Tennessee by the relatives of the minors to deprive *Judge Brown* of the guardianship, but without a successful result. It also appears that some of the relations of *Mary* had, soon after the father's death, expressed to the guardian their desire to have charge of her person, and *Mr. Chapman* had sent a letter to him to that effect by the hands of *Miss Crockett* some years since, which request he declined to accede to, explaining the sacred obligations to *Dr. McNeil* which he had assumed, but informing them that every opportunity, consistent with his duty, should be afforded them to see the children, and to cultivate relations of kindness with them.

In 1848 *Miss Crockett* and her brother, *Dr. Crockett*, visited Nashville, and called at the house of *Judge Brown*. They asked to see the children, and were permitted to do so. They represented that they intended to spend several weeks in Tennessee, and requested that *Mary* might be permitted to dine with them on the next day at the house of a friend. *Judge Brown* assented, and on the following day *Dr. Crockett* and his sister came for the child, and took her to their friend's house. After dinner they went out with the child in a hired coach, representing that they were going to make a visit to a friend who lived two or three miles from Nashville. Having thus by stratagem and false representation obtained possession of the child, they traveled with all haste in the direction of Memphis, *Dr. Crockett* taking seats in the public stages under a feigned name; and at length by the usual conveyances he and his sister arrived at New Orleans with *Mary*. Several witnesses, who saw them on the route through Tennessee, describe the child as being in great distress, imploring her abductors to take her back to Nashville, and soliciting protection at the inns where they stopped. Her conduct, as described by the witnesses, manifested throughout a strong desire to

return to her home, great attachment to those whom she had been accustomed to regard as her parents, and such resistance as a child could make under the extraordinary circumstances in which she was placed.

On the arrival of the parties at New Orleans, the child was taken to the house of *Mrs. Chapman*. Her movements there would seem to have been in some degree guarded, but there is no reason, from the evidence, to infer any unkindness on the part of her relations at New Orleans.

As soon as it was found that the child had been carried off, great alarm and distress were manifested by the plaintiff. Measures were taken, at much expense and trouble, to discover the fugitives, and a gentleman of the bar was despatched to New Orleans in search for the child here. After an interval of a few days, he ascertained that she was at the house of *Mr. Chapman*, and applied to one of our courts for writs of *habeas corpus*, which were served upon *Lucinda Crockett*, *Dr. Crockett* and *Chapman*. After service on the 2d May upon the latter, the child was taken by *Mrs. Chapman* out of the parish, to the plantation of a friend. *Chapman* appeared on the 3d May, and answered under oath that it was impossible for him to comply with the order to produce the child, "as the said *Mary McNeil* is not in his custody, nor has she ever been in his custody or under his control." *Lucinda Crockett* answered under oath that she did not know where *Mary* was. In an amended answer, made on the 4th of May, *Chapman* declared that *Mary* had left his house on the previous day, and that he did not know with whom she left, where she went, or where she was. His answer was excepted to as evasive; he was required to answer further, and an order of arrest was issued against him. On the following day, having been arrested, he filed a further answer under oath, in which he says he may have suspected that his wife had left his house with *Mary McNeil*, but that he did not know, nor had he any means of knowing the fact, as every thing relating to the departure took place during his absence from home, and was concealed from him; that the first information he had of the fact that his wife had left with the said *Mary McNeil*, was derived from the testimony of a witness examined before the Court on the previous day. That he had despatched a messenger to the adjoining parish, whither they had gone, urging their return. *Dr. Crockett* in his answer admitted the abduction, set up various matters in justification, and declined to obey the order of the Court. The place of concealment of the minor in an adjoining parish being ascertained, further writs were issued, and on the 6th May *Mrs. Chapman* appeared in Court with the child. She answered under oath that she had not held the child in confinement, but that being her niece, and having been placed in her possession by her brother, *Dr. Crockett*, she had taken the best possible care of her, and in doing so believed she had acted for the best interest of the minor; but that as soon as the writ was served upon her, she had returned with the child to New Orleans from the residence of a friend in an adjoining parish, where they were on a visit which the minor expressed a desire to make.

The District Judge being of opinion that stratagems and violence had been employed to take *Mary* from the custody of her lawful guardian in a sister State, ordered her to be delivered to the plaintiff's agent, which was accordingly done, the child declaring, in the presence of the Court, her anxiety to return to the plaintiff, and manifesting much delight at her release.

Such is substantially the state of facts upon which the plaintiff relies for an affirmance of the verdict. We deem it our duty to say that a more extraordinary violation of law and personal liberty has never been presented in the annals of our civil jurisprudence; and no terms of censure of the conduct of *Dr. Crockett*.

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ett and his sister, however strong, could be considered undeserved. The only palliation which counsel has attempted to offer, is in the suggestion, that they were prompted by a strong impulse of natural affection. But a court cannot listen favorably to a suggestion of good motives from parties whose conduct in the transactions which they attempt to defend is stained by disreputable artifice.

But it is said that the verdict is unjust as to *Mr.* and *Mrs. Chapman*, who did not participate in the forcible abduction of the minor from Tennessee, and merely opened their doors to her on her arrival at New Orleans.

It is true that there is no direct evidence that the abduction was committed at their suggestion, or that they had advised or encouraged it; but it was distinctly charged in the petition, that *Mr.* and *Mrs. Chapman* were accessory to the abduction, and the jury seemed to have inferred that the charge was true, inasmuch as they have found the same amount of damages against all the defendants. When we look to the conduct of these two defendants, after the minor's arrival here, and the surrounding circumstances, we are constrained to say that they are not of such a character as to permit us to disturb the verdict of the jury. Considering the relation by blood, or marriage to the two principal actors in this strange drama, and to each other, the previous desire manifested by *Mr. Chapman* to have possession of the child, the reception of the plaintiff's ward at their house, the grossly unjustifiable attempt to evade the writ of *habeas corpus*, the painful disingenuousness, to use no harsher term, of their answers under oath, we are not prepared to say that the charge of complicity is unsupported by the evidence.

The exception separately pleaded by *Mrs. Chapman* was properly overruled. That under our jurisprudence a married woman is liable in damages to the injured party for an offence (*délit*) committed by her is clear, and she is not relieved from liability by the fact of her husband's presence or concurrence. See *Merlin*, verbo *Autorization Maritale*, No. 18. Whether marital coercion would excuse her, or go in mitigation of damages, is a question which does not arise in this cause.

It is said the damages allowed by the jury are excessive. We do not think so. In the first place, expense to more than half of the amount allowed, has been actually incurred, as the evidence shows, in the effort made to search for the ward and restore her to the custody of her guardian. In the next place, the jury had clearly a right to consider the mental pain inflicted upon the child, a legitimate subject of amend. See Civil Code, Art. 1928. In doing so, "much discretion must be left to the jury," *ib.*; and the exercise of this discretion a court will not disturb on light grounds, but will restrict its control to cases of manifest excess. We have no reason to consider the verdict in this case passionate or capricious; on the contrary, when the aggravated circumstances of the wrongs complained of are considered, it seems to us that the jury used their power with moderation.

The testimony of *Brown* was properly admitted. He sues for the benefit of the minor, and does not appear to have any pecuniary interest in the merit of the cause. Doubtless the court in Tennessee, to which he owes an account of his administration, would allow him credit for the moneys he has reasonably expended in his efforts to recover the person of his ward, even if he did not succeed in collecting their amount in the form of damages from the wrong-doers. That he feels a deep moral interest in the success of this suit may be assumed; but this would go only to his credibility. See *DeKerlegand v. Robins*, 1 Annual, 227. *Parker v. Moore*, 2 Annual, 1017.

Judgment affirmed with costs.

CHAPMAN & GOODLOE v. JESSE HART.

After answer filed, it is too late to compel plaintiff, who sues on an account, to file a detailed bill.

APPEAL from the Sixth District Court, Parish of West Baton Rouge, *Robertson, J. Brunot*, for plaintiffs. *J. G. & P. H. Morgan*, for defendant and appellant.

Rost, J. The judgment in this case appears to us to be authorized by the evidence.

The putting up of a sugar mill and engine, is one entire job, of which planters and mechanics know the details. The defendant evidently knew them, and did not ask in his answer, that the plaintiffs be compelled to file a detailed bill of the work; this is unusual and unnecessary, and under the pleadings, the Court did not err in refusing subsequently to compel the plaintiffs to file such a bill.

We are of opinion that the Court exercised a sound discretion in refusing a new trial.

Judgment affirmed with costs.

SARAH HAYNES, *alias* MIELKIE, v. HENRY FORNO et al., C. Y. HUTCHINSON, and H. R. W. HILL, Curator.

Mielkie, whose domicile was in Vicksburg, gave the plaintiff, his slave, in April, 1848, the following permit: "My negro woman Sarah Haynes, about thirty years old, has permission to pass unmolested to Cincinnati and the State of Ohio generally, or any other free State she may choose." *By the Court.* Her passage was provided for by her master, and she was sent to Cincinnati for the purpose of being made free. It does not appear that she remained longer than several days in Cincinnati, and she came to New Orleans in the same spring. The testimony shows that she has remained here since, with this exception, that in 1844, or 1845, she went to Vicksburg. We infer that she remained there but a short time. As the plaintiff has violated the law by coming into and remaining in this State in direct disobedience of its provisions, she cannot be considered as having acquired any rights, dependent on domicile or residence here, and her status must be determined by the laws of the domicile of her master. We cannot distinguish this case from that of *Hinda v. Bracaille*, 2 Howard's (Mississippi) Rep. 841; *Mary v. Brown*, 5 A. 271. On the principles recognized by this Court in *Lisa v. Puisseant*, 7 Annual, 83, the plaintiff would not be considered as having acquired her freedom by her presence in Cincinnati.

APPEAL from the First District Court of New Orleans, *Lea, J. Tappan*, for plaintiff, cited: *Arsene v. Pigneguy*, 2 A. 621; *Eugénie v. Preral*, 2 A. 181; *Josephine v. Poultney*, 1 A. 324; *Smith v. Smith*, 13 L. R. 444; *Marie Louise v. Marot*, 9 L. R. 475; *Frank v. Powell*, 11 L. R. 500; *Thomas v. Genens*, 16 L. R. 483; *Liza v. Puisseant*, 7 A. 83; *Lumsford v. Coquillon*, 2 N. S. 408; *Blackman v. Powell*, 7 Yerges, 452.

Marr, for defendant. It is evident that Sarah did not go to Cincinnati with the intention of remaining; and as the Court decided in *Liza v. Puisseant*, 7 A. 83, it would require such intention to operate the freedom of the slave under the laws of Louisiana. See also *Jane v. Carsore*, Opinion Book 22, p. 196.

But the status of the slave must be tested by the law of Mississippi, where the owner resided, and where the writing under which she claims her freedom, was executed. The law of that State forbids the emancipation of slaves otherwise than by an instrument in writing duly proved or acknowledged, and proof

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to the General Assembly of some meritorious act by the slave, followed by an Act of the General Assembly, sanctioning the emancipation, and a compliance by the owner with the conditions imposed by that Act. Hutchinson's Code, p. 523, No. 75.

It has been decided by the Supreme Court of Mississippi, that a deed of emancipation, executed in Ohio by the master, who went there with his slaves for that purpose, and afterwards returned to Mississippi with the slaves, was in fraud of the laws of Mississippi, and totally void, although the master recited in his will the fact that he had executed such a deed, and declared his intention to ratify it, and acknowledged one of the slaves to be his son. *Hinds et al. v. Brazealle et al.*, 2 Howard's Miss. Rep. 841, 42, 43. If all these solemnities were in vain because they were in contravention of a law established for wise purposes of public policy, surely a mere *permit* to go to a free State, cannot be more effectual.

The true rule is laid down in the case of the *Slave Grace* 2 Hagg, Adm. Rep. 94, and, although more liberal views once prevailed in Louisiana, we have been compelled to return to the English doctrine. The slave who goes, by the permission of his master, to a free State, does not thereby become free. He merely ceases to be subject to the coercion of his master, so long as he remains in free territory; but the moment he returns *voluntarily* to his master's domicil he is again subject to his authority, and resumes his former condition. Act 1846, p. 163.

ERSTIS, C. J. The defendant is the guardian of *Constance Mielkie*, a minor under the age of puberty, appointed by a Court of competent jurisdiction, in Galveston county, Texas, where the parties reside.

The plaintiff, a negro woman, sues the defendant for her freedom. The judgment of the District Court is in favor of the defendant, and the plaintiff has taken this appeal.

The minor is the legitimate child of *Edward C. Mielkie*, whose domicil and residence were in Vicksburg, Mississippi; he died there in February, 1846.

It is proved that the plaintiff, who was the slave of *Mielkie*, left his service in April, 1843, for Cincinnati, in Ohio, under the following permit:

"My negro woman, *Sarah Haynes*, about thirty years old, has permission to pass unmolested to Cincinnati and the State of Ohio generally, or any other free State she may choose. [Signed] EDWARD C. MIELKIE."

Her passage was provided for by her master, and she was sent to Cincinnati for the purpose of being made free. It does not appear that she remained longer than several days in Cincinnati, and she came to New Orleans in the same spring. The testimony shows that she has remained here since, with this exception, that in 1844 or 1845, she went to Vicksburg. We infer that she remained there but a short time.

As the plaintiff has violated the law by coming into and remaining in this State, in direct disobedience of its provisions, she cannot be considered as having acquired any rights dependent on domicil, or residence here. *Jane Ross v. Andrew Carson*, 7th Annual. Her status must be determined according to the laws of the domicil of her master. We cannot distinguish this case from that of *Hinds v. Brazealle*, 2d Howard's (Mississippi) Reports, 841, and *Mary v. Brown*, 5 Annual Reports, 271.

On the principles recognized by this Court in *Liza v. Puissant*, 7th Annual Rep. 83, the plaintiff would not be considered as having acquired her freedom by her presence in Cincinnati.

The judgment of the District Court is, therefore, affirmed with costs.

ARMAND and ALFRED MERCIER v. J. F. CANONGE et al., CITIZENS'
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It is true, that by the Code, the property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it. But an interpretation of this provision, independent of other principles of our laws and jurisprudence, is inadmissible.

Ordinary mortgages are required to be created by the formal, written consent of the parties, for specific sums, and to be inscribed upon the public records. But the tacit mortgage operates secretly, and by a legal fiction. It is in derogation of common right. It should, therefore, be strictly construed. The propriety of such strict construction is aided by the consideration that the system of tacit mortgages is one which tends to impair public confidence, and check that free circulation of property which is so conducive to the general prosperity.

As against innocent third persons, purchasers, or mortgagees for a valuable consideration, the language of the Code may be properly interpreted as applying to the ostensible property of the tutor, and as not extending to that in which he has only a covert, equitable interest.

The law treats minors as a privileged class in certain respects; but its protection is not to be strained to the detriment of the great mass of society, or to the sacrifice of that well-settled rule which regards with favor the rights of an innocent purchaser, and refuses to affect him by a secret equity.

It would be a doctrine fraught with the most dangerous consequences to stockholders, and inconsistent with the theory of corporations, to hold that the private knowledge of two Directors, not clothed with any special authority in the premises, and constituting a small minority of the Board—and which knowledge was not disclosed to the Board—should destroy the rights of the Corporation.

There is nothing in the Code to limit the minor's tacit mortgage to the property which stands upon the public records in the name of the tutor. The Article of the Code is general in its terms, and embraces all the property—*tous les biens*—which can be shewn to belong to the tutor.—*Roel, J.*, dissenting.

The tutor has himself acknowledged that he placed the property in the name of his sister, to keep it from the minor's mortgage. He could not do indirectly, what he could not have done directly.
Roel, J.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Soult*, for plaintiffs. *Denis and Pitot*, for defendants and appellants.

SLIDELL,* J. The plaintiffs are creditors of *J. F. Canonge*, their former tutor, who was appointed in 1832, and gave the usual bond, with a surety. The object of the present suit is to enforce their alleged right of tacit mortgage upon certain real estate, which was mortgaged in the years 1837, 1838, and 1839, by *Miss Aimée Canonge*, to the Citizens' Bank and the Union Bank. Their pretensions are resisted by the Banks, who are the appellants in this cause, from a judgment according a preference to the tacit mortgagees.

The real estate in question never at any time stood upon the public records in the name of *J. F. Canonge*. It was conveyed by other parties to *Miss Canonge*, by deeds in the usual form; and in these deeds, and in the mortgages executed by her in favor of the Banks, she appeared as the unqualified owner. But under the parole evidence, (the exceptions to which we deem it unnecessary to consider,) it appears that *Miss Canonge* had only the apparent title. The whole of the property was, in reality, purchased by *Jean François Canonge*, her brother, for his own account, and with his own funds. The titles of the property were made to her for his convenience, and with a view to its easy use for the purpose of future sale or mortgage; which could not have been effected with the same facility, if they had been purchased in his own name, in consequence of his holding the office of tutor, which would have involved the incumbrance of a tacit mortgage in favor of his wards. *Canonge*, in his answer, asserts that he

* *Eastle, C. J.*, did not sit in this case, having an interest in the event, he being a stockholder of the Union Bank.

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believed at the time, that his other property was amply sufficient for the protection of his wards, and the evidence tends to justify the sincerity of that opinion. However important this may be, so far as the mere moral aspect of the transaction may be involved, we have not considered it as materially affecting the legal questions presented for our solution.

The District Judge was of opinion that the tacit mortgage of the minors operated upon the property to the detriment of the Banks, even considered as third persons.

It is true that by our Code, "the property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it." Civil Code, art. 3782. If these terms are to be interpreted in their largest and most liberal sense, and without reference to the provisions and principles of our laws and jurisprudence, the conclusion might be drawn from them that all the tutor's property, legal or equitable, open or concealed, was affected by the tacit incumbrance in preference to all the world. But an interpretation thus isolated seems to us inadmissible.

Ordinary mortgages are required to be created by the formal, written consent of the parties, for specific sums, and to be inscribed upon the public records. But the tacit mortgage operates secretly, and by a legal fiction. It is in derogation of common right. It should, therefore, be strictly construed. The propriety of such strict construction is aided by the consideration that the system of tacit mortgages is one which tends to impair public confidence, and check the free circulation of property, which is so conducive to the general prosperity.

Keeping these principles in view, we are of opinion that as against innocent third persons, purchasers, or mortgagees for a valuable consideration, the language of the Code may be properly interpreted as applying to the ostensible property of the tutor, and as not extending to that in which he has only a covert, equitable interest.

It is said by counsel that minors are the favorites of the law. The law does treat them as a privileged class in certain respects; but its protection is not to be strained to the detriment of the great mass of society. If the doctrine for which the plaintiffs contend be sanctioned, what becomes of that settled rule of jurisprudence which regards with favor the rights of an innocent purchaser, and refuses to affect him by a secret equity? See the case of *Pike v. Monget*, 4 Annual. *Sayton v. McGill*, 2 Ann. 196. *Mills v. Faleey*, 1849—not reported. *Stockton v. Craddick*, 4 Ann. 286.

The next inquiry is, whether these mortgagees, as is charged, knew when they took their mortgages that, although apparently held by *Miss Canonge*, the property was, in truth, her brother's?

It is obvious that, on this point, the burden is upon the plaintiffs.

As to the Citizens' Bank, it appears that when *Miss Canonge* applied to become a stockholder, which involved a mortgage to secure the stock and stock loans, her titles were submitted, in the usual course, to the attorneys and counsel of the Bank, and were approved. In addition to their report, the Bank was fortified in its confidence by the affidavit of *Miss Canonge*, according to the usual formula prescribed to applicants, that she "was truly and *bona fide* owner of the property by her offered to be mortgaged to the Citizens' Bank of Louisiana to secure the stock she had subscribed for in said institution."

The parole evidence is entirely insufficient to affect the first mortgage given to the Citizens' Bank, by establishing a knowledge of the simulated title of

Miss Canonge. In relation to the subsequent incumbrance in favor of that Bank, it is proper to enter into a more detailed notice of the evidence.

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J. F. Canonge deposed as follows: "When I found it impossible to meet my engagements with the several institutions mentioned in the petition of *Armand and Alfred Mercier*, I wrote to them in order to obtain some indulgence, and by turning to my letters, which must be in existence, it will be seen, if my memory serves me well—I believe it does—that I offered to give them mortgages upon the property placed in the name of my sister, and I actually informed them that the property was mine."

To rebut this testimony, as may be reasonably inferred, the defendants offered in evidence, at the trial before the Judge of the Third District Court of New Orleans, the letters of *Canonge* to the Banks. It is not asserted by the counsel for the plaintiffs that these letters revealed the true condition of the property; and the recollection of *Canonge*, who does not profess to speak positively, is probably inaccurate. That they did not, is asserted by the counsel for the Bank, and at present, for the purposes of argument, we will assume that they did not.

From the other testimony in the cause, it appears that two Directors of the Citizens' Bank were aware, at the period, at least, of some of the mortgage transactions with that Bank, that *Miss Canonge* held property for her brother. But, on the other hand, it is proved affirmatively that others of the Directors were ignorant of it, and that the subject was never brought before the Board. The Board consisted of — Directors, and there is no evidence that the two Directors above referred to were specially charged with the business of these mortgages, or had authority in the affairs of the Bank, other than that which pertained to them *virtute officii* under the charter. It would be a doctrine fraught with the most dangerous consequences to stockholders, and inconsistent with the theory of corporations, to say that the private knowledge of those two Directors, (not clothed with any special authority in the premises, and constituting a small minority of the whole number,) which knowledge was undisclosed to the Board, should destroy the rights of the corporation. This would be attributing to such minority a power to do indirectly, what directly they would be incompetent to do. See the *Louisiana State Bank v. Senecal*, 13 La. Rep. 525. *Commercial Bank v. Cunningham*, 24 Pick., 276. *National Bank v. Norton*, 1 Hill, 578. *Ex-parte Walkins*, 2 Montegut, 348, cited in *Angel & Ames on Corp.*, chap. ix. p. 301.

With regard to the Union Bank, it is in evidence, that two of its Directors were aware that the property standing in *Miss Canonge's* name belonged to her brother. One of them states that he is unable to say whether he derived this information from a conversation with *Canonge*, or from a letter written by him to the Bank; but that it was from one or other of those sources. This letter, addressed by *Canonge* to the Bank, was offered in evidence by the defendants. It contains no suggestion that the property, which he states that his sister will mortgage to secure his liability to the Bank, belongs to himself; and we must, therefore, conclude that the Director derived his information from a personal conversation with *Canonge*, which, it is not shown, was communicated to the Board, or to his associates. The other Director was the person who made the conveyance to *Miss Canonge*, some years before, at the request of her brother, for whom he had previously held the title. The corporation is not, in our opinion, affected by the knowledge of these two Directors, who do not appear to have had any special authority in the matter. The same opinion, *a fortiori*, applies to the knowledge of the Notary before whom the act, or mortgage, was

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executed, and who was a mere ministerial officer, employed to clothe in notarial form the contract between the corporation and the other parties.

After a careful consideration of the testimony and documentary evidence in this cause, we are of opinion that the mortgagee dealt with *Miss Canonge* upon the faith of the apparent titles, and without direct or constructive notice of the simulation of those titles; and that, as innocent third persons, who have given a valuable consideration, they are to be preferred to the minors. The latter must look for their indemnity to their tutor, and to his official surety.

It is proper, here, to observe that some of the letters of *Canonge* to the Citizens' Bank, which were offered in evidence by the Bank, have been mislaid since the trial. It is asserted by the counsel of the Bank that these letters did not disclose the fact that *Canonge* was the real owner of the property mortgaged, and we do not understand the counsel of the plaintiffs as asserting the contrary. Under all the circumstances of the case, and there having been no application to have the cause remanded, in order to supply the loss of these letters by evidence of their contents, we have assumed that they did not disclose the real ownership. If the plaintiffs' counsel had differed with the counsel of the defendants in his recollection of the contents of the letters, we should have considered it a sufficient cause for remanding; and, if there be any difference of recollection now, we should be disposed still to consider it, on an application for rehearing, accompanied by a representation of counsel to that effect.

It is, therefore, decreed that so much of the judgment of the Court below, as in any wise affects the said Citizens' Bank of Louisiana and the said Union Bank of Louisiana, be reversed, and that there be judgment in favor of the said Citizens' Bank of Louisiana and the said Union Bank of Louisiana, and against the said plaintiffs, the costs, in both Courts, of the proceeding against said Banks to be paid by the said plaintiffs.

DUNBAR, J., concurred in the opinion delivered by *Slidell, J.*

ROST, J., (dissenting.) It is true that the petition and answers present all the issues of a revocatory action, and it is in that aspect that the case has been almost exclusively argued in behalf of the appellants. The authorities cited by their counsel from the French commentators have exclusive reference to the *Actio Polliana*, and the cases of *Thomas v. Meude*, and *Foster v. Foster*, were, also, revocatory actions. Toullier, vol. 8, Nos. 56, 57, 146. Chardon, *de la Fraude*, p. 129 to 132. Duranton, 10, Nos. 581, 582, 583. Tolon, *Théorie, &c.*, vol. 2, Nos. 183 to 172. 8 N. S. 341. 11 L. R. 401.

The rule to be deduced from those authorities is, that if a suit be brought to set aside a conveyance obtained by fraud, or made in fraud of creditors, and the fraud be proved, the conveyance will be set aside between the parties. But the rights of third persons, acquired in good faith on the property after the date of the fraudulent conveyance, will not be disregarded. This principle will never be departed from, and if the mortgages in this case were taken in good faith and for a valuable consideration, it is clear they could not be set aside in a revocatory action. I do not deem it necessary to go at large into the question of good faith, as if there was bad faith. I incline to the opinion of the District Judge, that the action would be barred by the prescription of one year, under Art. 1982, C. C. In justice to the defendants, however, it is proper to state that the evidence does not justify the imputation of an intention on their part to commit a fraud against the plaintiffs. The knowledge of the Notary and of some of the Directors of the Union Bank, is not the knowledge of the corporation, and although it seems conceded that the Citizens' Bank was aware of the

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real ownership of the property when they took the last mortgage, it is nowhere shown that they were aware at the time, of the claim of the plaintiffs, or even of the fact that *Canonge* was their tutor.

But, as well observed by the District Judge, there is another light in which the claim of the plaintiffs is set forth. They claim a legal mortgage upon this property on the ground that it was, in reality, owned by their tutor while they were under his guardianship. It is not necessary, under this view of the action, that the subsequent mortgages be revoked. It is sufficient to establish the existence and priority of their own.

To arrive at a correct solution of the important question thus presented, I will first examine what the rights of the plaintiffs were, in relation to that property after *Miss Canonge* purchased it, and before she gave a mortgage upon it to the appellants. Art. 3280, C. C., provides that minors have a legal mortgage on the property of their tutor from the day of his appointment, as a surety for his administration. The appellants' counsel urge, that this article only includes the property standing in the name of the tutor on the public records. Under this interpretation, property acquired by inheritance, or by prescription, and held without title, would never be affected by legal mortgages. There is nothing in the Article of the Code to authorise such a limitation. It is general in its terms, and embraces all the property, *tous les biens*, which can be shown to belong to the tutor.

The evidence placed the fact beyond all doubt, and it was admitted in argument, that the property in dispute was purchased and paid for by *Judge Canonge*, and that it belonged to him. I fully believe that the title was not thus taken with any fraudulent intent; but *Judge Canonge* himself has stated that his object was to keep the property from the minors' mortgage, and it is elementary that he could not do indirectly what he could not have done directly. So long as no right in the property, adverse to that of the plaintiffs, had been created, they had nothing to do but to remove the shadow cast upon the title, and their legal mortgage would affect the property by operation of law. The property would, in that case, have returned to *Canonge* free from the ordinary debts of his sister, and in a contest with his creditors the plaintiffs would have been entitled to be paid by preference, according to the date of their legal mortgage.

Let us now proceed one step farther, and ascertain whether the legal mortgage does not also affect the property to the prejudice of the appellants. It is said, in their behalf, that they acted with due diligence in their dealings with *Miss Canonge*, and that as they had, and in the nature of things could have no notice of the legal mortgage of the plaintiffs, it cannot be exercised to their prejudice.

If this was one of the mortgages for which the law requires publicity, the argument would be unanswerable. The mortgage would unquestionably have lost its rank for want of inscription. But the legal mortgages which the law gives to minors are not thus affected by non-inscription. No publicity is required as to them, and I can make no distinction between this case and another very similar to it, which naturally suggests itself to the mind. Suppose that notes belonging to the minors had been placed by the tutor in the hands of his sister for collection, and that after collecting them she had invested the proceeds in houses and lots. This would have been such an interference in the administration of the minors' property, as would have created a legal mortgage on all the property of *Miss Canonge* under Art. 3183 C. C. The origin of the funds used in those purchases would have been, between the purchaser and her brother, a family secret, impossible to discover. The record of mortgages would have

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shown no lien upon her property, and in subscribing for stock of the Citizens' Bank she might have sworn, with perfect truth, that she was the owner of the property, and also that she never had been tutrix of minors. The Bank must, therefore, in that case also have been satisfied with her title, and yet the legal mortgage of the plaintiffs would remain in full force, and take precedence of all others. *Ward v. Brandt et al.*, 11 Martin 331. *Nolte & Co. v. their Creditors*, 8 N. S. 867. Art. 3283 C. C.

If there be any difference between the two cases, the case put would be harder than the present upon the defendants.

It should not be lost sight of, that there are cases in which the registry laws themselves are inadequate to the protection of innocent third persons, even where registry is required. It is so, for instance, in cases of resolution of sales for the non-payment of the price. The property returns to the vendor free from all incumbrances which affected it in the name of the purchaser, either by convention, or by operation, of law, and it is no defence for a subsequent mortgagee that he had no notice of the right of the vendor to claim the resolution of the contract. *Chrétien v. Richardson et al.*, 5th Annual.

It has been urged that part of the money borrowed by *Miss Canonge* went to pay the price of the property mortgaged; but there is no satisfactory evidence of that fact.

The Royal street property, although purchased before the appointment of *Judge Canonge* as tutor, belonged to him during the tutorship, and is, like the other, subject to the plaintiffs' mortgage.

I am of opinion that justice has been done between the parties, and that the judgment ought to be affirmed.

SUCCESSION OF JOHN S. CALDWELL.

In an attachment suit, if the judgment does not decree that the plaintiff shall be paid by privilege out of the proceeds of the property attached, it will be regarded as an ordinary judgment.

The confidential and head clerk and manager of a bar-room and eating-house, has a privilege for his wages on the movables of the establishment.

W. had charge of the ten pin alleys, and received the money paid at them during the day, and made his returns when they were closed. If this occupation did not give him a privilege as an agent under articles 8158, 8181, 8219 and 8221 of the Code, yet it entitles him to be classed with servants, and as such gives him a privilege.

The Sheriff was sued for the value of certain movables seized and sold by him under a number of attachments. In his answer, he called on the attaching creditors to defend him and asked that they might be made parties to the suit, so that if judgment was rendered against him, he might have judgment over against them. All the creditors but one appeared and justified the seizure. *Held*: that the fee paid by the Sheriff to counsel for defending the attachment, was a claim to be paid by the attaching creditors.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Bonford and Finney, for Foley. Bayne & Magne and Koonts and Hoffman & Ogden and Cohen.*

Bonford & Finney contended that "there was no necessity to insert in the judgment in an attachment suit a clause affirming, or recognizing the creditor's rights under the attachment," and cited C. P. 265, *Tufts v. Carradine*, 3, An. 480. *Harmon v. Paul Juge, file, et al.*, 6 An. 768. *Holmes v. her Husband*, 9 Rob. 118.

Gustine v. the Bank of Louisiana, 10 Rob. 418. Sergeant on Attachment, p. 20.
Ines v. Sturgis, 12 Metcalf, 462. *Daveport v. Tilton*, 10 Metcalf, 320.

SUCCESSION
 OF
 J. B. CALDWELL.

ESTES, C. J. This appeal is taken from a judgment of the Court of the Fourth District of New Orleans, rendered on a tableau of distribution filed by the curators of the succession.

J. S. Foley, one of the appellants, is a creditor of the succession by virtue of a subrogation to the rights of *J. & G. Forbes*, plaintiffs in two certain suits commenced by attachment in the Third District Court of New Orleans, against *Caldwell as an absentee*. One of these judgments, to wit: No. 3805, for \$1356 81 cts., was opposed by *Henderson & Gaines*, subsequent attaching creditors, on the ground that no privilege had been given to the plaintiffs by that judgment. The District Judge placed *Foley* as an ordinary creditor on the tableau, without any privilege or right of priority, and from this decision *Foley* has appealed.

The judgment is in the common form of personal judgments. It decrees that the plaintiff recover from the defendant the sum of \$1356 81 with interest and costs, with a stay of execution on a portion until the 16th of July instant.

We think the usual practice in rendering judgments in attachment suits, is to make provision for the right of the party on the property attached. From this practice, we think there would be no propriety in deviating. The present case strongly illustrates the reason and necessity of some such provision in the judgment, inasmuch as by the Sheriff's return to the writs of attachment, there were no less than twenty-two conflicting attaching creditors.

The case of *Harmon v. Juge*, 6th Annual Rep. 768, referred to by the counsel for the appellant, we think, is in affirmance of this practice. In all the judgments under review there, provision was made in them for satisfaction out of the property attached. We find nothing in the other cases referred to by counsel, which is in conflict with this view of the subject. The forms of judgment under the attachment laws of other States and the systems of law which prevail there and in England,—so different from ours in the whole doctrine of privileges—afford no grounds for changing our own. We think, therefore, the District Judge did not err in considering the appellant as an ordinary creditor of the succession, and so decreeing.

Foley, the appellant, has also objected to the allowance of two privileged claims, those of *Turnbull* and *Wooster*, each of whom are judgment creditors. The objection is against their privileges. The District Judge allowed the privileges under the articles 3158 and 3181, 3219 and 3221.

Turnbull, it is shown by the testimony, was the confidential and head clerk and manager of the establishment of the deceased, which consisted of a bar room and eating house known as the Phoenix House, in St. Charles street. We think the privilege attached to his wages as a clerk or agent of that sort.

Wooster had charge of the ten pin alleys, and received the money paid at them during the day, and made his returns when they were closed. If this occupation did not give him a privilege as an agent under the articles cited, we are of opinion that it is included within the class of servants which is more comprehensive in the sense of the Code, and authorizes the privilege allowed.

John L. Lewis is also an appellant from a disallowance of a claim of five hundred dollars for professional services, expended by him in the suit of *Miles Judson* against him as Sheriff.

This claim is presented in an irregular form, the amount not being in the hands of the curator for distribution; but as the parties have joined issue and tried it in this form, and have so argued it in this Court, we see no objection to its being

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adjudicated upon, but without receiving the countenance of this Court as a precedent of practice.

The amount of five hundred dollars was paid by *Mr. Lewis*, who was the Sheriff who made the seizure of the establishment of the Phoenix House, for professional services, in defending the suit of *Miles Judson* against him, in this Court and the District Court. The amount of this fee is not disputed, but the right to charge the same to the succession is disputed.

This appellant offered in evidence the receipt for the five hundred dollars, the proceedings in the case of *Judson*, and the amount of the nett proceeds of the sales of the property attached, amounting to \$4,788 05.

The suit of *Miles Judson* in which this expense of five hundred dollars was incurred, was instituted against the Sheriff for the recovery of the liquors, movables and fixtures of the Phoenix House, taken possession of by him, or for their value, being the sum of five thousand dollars, and the sum of one hundred dollars per day for the time the plaintiff was kept out of the property; and also the further sum of five hundred dollars for the trespass and alleged seizure, &c. *Judson*, the plaintiff, claimed the property under an act of sale from *Caldwell*, made previous to the seizure. The District Judge gave the plaintiff the sum of \$4,400, to be paid out of the proceeds of the property attached.

This Court reversed the judgment of the District Court, and gave judgment for the defendants, and directed the proceeds to be distributed among the creditors, under the order of the Court from which the first suit of attachment emanated.

When the suit was at issue the Sheriff in his answer called upon the attaching creditors to defend him, and inasmuch as the several attachments—twenty-two in number—were from the five District Courts of New Orleans, he asked that they might be made parties to his suit, and their rights upon the property therein be adjudicated upon, and for judgment over against them in the event of the plaintiff's recovering. The creditors with one exception appeared and pleaded avouching the legality of the seizure by the Sheriff, and the responsibility of the Phoenix House movables to their several attachments.

The movables in the meantime had been sold under a consent of parties, and it does not appear that any effort was made to charge the Sheriff personally with damages.

It appears also that the Sheriff was one of the appellants to this Court, and on the minutes of the 15th of December, 1851, his counsel was one of those who argued the cause, having filed a brief for his client.

We think, under the circumstances, that the Sheriff had the right to employ counsel at the expense of the attaching creditors, and that they were bound to indemnify him, having virtually made his doings their own. It is true they had their own attorneys employed, and the difficulty arises from a want of mutual understanding on this point. We cannot distinguish this case from that of *Stewart v. Lapeley*, recently decided by this Court. The only difference between the two cases is, that in that case the Sheriff had an indemnity bond from the seizing creditor; in this case the creditors adopt and sustain the acts of the Sheriff.

It is therefore decreed, that the judgment of the District Court on the tableau of distribution be affirmed, with the exception of that part directing the curators to account for the sum of five hundred dollars retained by *John L. Lewis*, late Sheriff, for counsel fees paid in the case of *Miles Judson*, and discharging the same, which is reversed, and the said sum allowed to the said *John L. Lewis*, as claimed by him, with costs, and that the costs of this appeal be paid one-half by *Foley*, appellant, and the other by the succession.

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OF
J. S. CALDWELL.

ON an application for a rehearing, the following judgment was rendered :

It is ordered that the decree rendered in this case on the 10th of January last, be modified so as to read as follows: It is therefore ordered, adjudged and decreed, that the judgment of the Court below on the tableau of distribution be affirmed, with the exception of the part directing the curators to account for the sum of five hundred dollars retained by *John L. Lewis*, late Sheriff, for counsel fees paid in case of *Miles Judson*, and disallowing the same, and the part directing *L. L. Wooster* to be placed among the attaching creditors, which are reversed; and that *L. L. Wooster* be paid his claim in the rank recognized on the tableau—the sum of two hundred and seventy-four and 41-00 dollars—and that said *J. L. Lewis* be allowed five hundred dollars, as claimed by him, and costs. It is further ordered that the costs of this appeal be paid one-half by *Foley*, appellant, and the other half by the succession.

HILL, McLEAN & Co. v. JOHN C. SIMPSON.

PREHN, CLEGG & Co et al., HAMILTON, MCKINDER & Co. et al.
and EDWARD DAVENNE et al.—*Intervenors*.

Plaintiff sold to *Simpson* cotton for cash on delivery. It was delivered on the 4th of June, and the plaintiffs, by their delivery of the cotton, gave the purchaser the ownership of it, and he appeared as such, and got credit on his purchase accordingly in the market, without any notice, or interference on the part of plaintiffs on account of their unpaid balance, until the 9th following. The plaintiffs had no privilege on that day which could conflict with the rights of intervenors. By their incautious delivery the plaintiffs enabled *Simpson* to do that for which cotton is bought in this market—to get credit and speculate upon it.

Whenever the owner has parted with his control over the goods, and cannot change their destination, his creditors cannot attach; but, whenever the owner can sell and deliver, the creditor may seize.

A PPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Semmes*, for plaintiffs and appellants. *Clarke*, for *Prehn & Co.*, Intervenor. *E. A. Bradford*, for *McKinder et al.*, and *Davenne et al.*

ECSTIS, C. J. This appeal is taken by the plaintiffs from a judgment rendered by the Fourth District Court of New Orleans against them, and in favor of certain intervening parties, who are the appellees in this Court.

The suits present a contest between the plaintiffs as attaching creditors and as vendors, and the intervenors, as commission merchants, claiming the right to hold a large quantity of cotton upon which they have made advances.

On the 3d of June, 1851, *Hill, McLean & Co.*, of New Orleans, sold to *John Simpson*, 819 bales of cotton for the price of \$30,585 72 cash, payable on delivery.

The cotton was stored in the Orleans cotton press, but was not delivered to *Simpson* until the 4th of June. On the day of the sale the plaintiffs received from *Simpson* \$20,000 on account, and on the 7th he gave them his check on *Robb & Co.*, bankers, for the balance, \$10,585 72, which was protested for non payment. For the receiving of this sum, and to enforce their privilege as vendors, the plaintiffs brought the present suit on the 9th of June. *Simpson* had absconded; the plaintiffs caused to be issued a writ of sequestration and writs of attachment against his property. The Sheriff seized the 819 bales of cotton un-

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der the writ of sequestration, and the writ of attachment was executed by process of garnishment against the intervening parties. On the 21st of June a confession of judgment was entered by *Simpson* in favor of the plaintiffs for the balance claimed, with privilege as vendors and as attaching creditors. Previous to this the appellees had intervened, and claimed, each for his interest, the cotton sequestered.

The District Judge was of opinion that the case could not be distinguished in principle from that of *Galbraith v. Lee*, reported in 6th Annual Reports, 348, and as the property was, at the time of the service of the writ, no longer in the possession of the buyer, he decided in favor of the intervenors, and against the vendor's privilege. He does not appear to have considered the attachments as creating any impediment to the exercise of the parties' claim for the cotton on account of their advances. The effect of these writs has been urged in argument in this Court. It will be considered after the examination of the plaintiffs' claim to a privilege as vendors.

A very carefully prepared printed argument has been submitted by the counsel for the plaintiffs, and we will consider the subject in the order in which he has placed his views before us.

It is urged that, in order to maintain the judgment of the District Court, the intervenors must establish two propositions:

1st. That, at the time of the seizure by the Sheriff, they had made specific advances to *Simpson* on the cotton seized. 2d, that at the time of the seizure, they had possession of the cotton, or that it was under their control.

If the advances were not specific, the Act of 1841, it is said, creates no privilege for the advances, and if, at the time of the seizure, they had parted with the possession of the property, or had lost, or forfeited their right to it, the judgment restoring the possession to them is erroneous.

The parties to these transactions being in perfect good faith, and there being nothing in them at all at variance with the usual course of business, either as to time, place, or circumstance, under the decisions of this court, there is another question which stands before that of specific advances made by the counsel, and that is, whether at the time of the seizure of the cotton, the vendors had a privilege on it. The sale was made for cash on delivery; it was delivered on the 4th of June, and the plaintiffs, by their delivery of the cotton, gave the purchaser the ownership of it, and he appeared as such, and got credit on his purchase, accordingly, in the market, without any notice or interference on the part of the plaintiffs on account of their unpaid balance until the 9th following. The plaintiffs had no privilege on that day which could conflict with the rights of the intervenors. By their incautious delivery, the plaintiffs enable *Simpson* to do that for which cotton is bought in this market—to get credit and speculate upon it. *Fetter v. Field*, 1 Annual Reports, 83. *Galbraith v. Lee*, 5 Annual Reports, 349.

Having, therefore, come to the conclusion that the plaintiffs had no privilege on the cotton at the time of the seizure, no further enquiry is pertinent on that part of the case, and it remains to examine the rights of the plaintiffs under their attachments. The cotton was not seized under the writs of attachment, but, it is contended that the garnishment of the intervenors embraces it, and renders them responsible for it to the plaintiffs.

We do not consider that there is any force in the objection to the validity of the transactions of some of the intervenors concerning portions of this cotton, founded on the fact that the advances were made on a promise to ship cotton to

Liverpool, and that before the matter was closed, one parcel was substituted for another. The undoubted credit that *Simpson* had at the time, the short period in which the arrangements were completed, and the *bona fide* delivery to the parties in furtherance of the obligation imposed by the advance, we think, place them on the same footing with regard to those parcels of cotton as the rest of the purchase of cotton stands.

If the rights of the plaintiffs as attaching creditors, as supposed by the counsel, are to be tested by the Act of 1841, which purports to amend the article 3214 of the code, it will be found that this article, as to its meaning and object, has, for years, been acted upon under a judicial interpretation by the Court in the last resort.

The privilege given by this article, says the Supreme Court, was evidently intended to aid the interests of trade and commerce, and promote a liberal spirit as to factors in respect to advances to their principals. The terms used in it should be understood and construed with reference to mercantile usages, &c. In giving an opinion as to the meaning of the word *advances* in the article cited, the Court says the word not being in any way qualified, we believe it to be our duty to give it that enlarged sense which best comports with the policy of the provision itself and the general convenience and usages of trade. *Turpin v. Reynolds*, 14 Louisiana Rep. 477.

Under this construction of the article into which the amendatory Act necessarily falls, we think the privilege of the intervenors could be maintained. But we do not desire to decide this case under that article, but on the ground where the law places it, as we conceive, and on the rights of the parties as they are presented by the evidence.

The fact of the possession of the cotton by *Simpson*, under the sale from the plaintiffs, can hardly be seriously contested under the statement of facts on which the argument of their counsel is based. But, it is contended that two of the intervenors, *Prehn, Clegg & Co.*, and *Davenne*, had parted with the possession of the cotton on which they had made advances, and thereby rendered it liable to the plaintiffs' attachment. It is conceded that these parties had, prior to the attachments, received from *Simpson*, bills of lading for the cotton claimed by them, and it seems, that these parties pledged the bills of lading to the house of *Dennistoun & Co.* and the *Canal Bank*, to secure certain bills of exchange drawn by them; the bills of lading to be returned on satisfactory acceptance of the bills of exchange. The seizure of the cotton was made under the writ of sequestration two days after this transfer of the bills of lading, and the garnishment was served at the same time, being two days after the parties had parted with the possession of the cotton in favor of *Dennistoun* and the *Canal Bank*.

In relation to this objection to the possession of the intervenors, we only think it material to observe, that this mode of transferring bills of lading as a security for the acceptance of bills drawn on the shipments, is not unusual in this market, and we find nothing in the evidence which authorizes us to believe that the transfer of the bills to the *Dennistouns*, or the *Canal Bank*, was of a tortuous character, in any sense—that it was done without the consent of *Simpson*, or that his bills of lading were used in any manner in which he could object to in the usual course of business in the cotton trade.

The rights of the intervenors as affected by the plaintiffs' garnishment, are not all of them exclusively dependent on the same facts, but we consider them all beyond its reach, and for the sake of argument, will assume that they are standing in a similar relation towards the plaintiff.

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At the time of the service of the garnishment all the cotton was on shipboard except ninety-two bales, for which bills of lading had been endorsed and delivered by *Simpson* to the intervenors. The shipment was completed, the bills of lading negotiated, and the property was entirely beyond the control of its owner.

We know of no case in which this Court has sanctioned the right of an attaching creditor to break up a shipment under these circumstances, and destroy all rights dependent on and created by the bill of lading. We understand the rule to be that, when the owner has parted with his control over it, and cannot change its destination, his creditors cannot attach; but, whenever the owner can sell and deliver, the creditor may seize. *Oliver v. Lake*, 8d Annual Rep., 78. *Blackly v. Matlock*, 8d Annual Rep. 375. *Hopp v. Glover*, 15 Louisiana Rep., 464. *Urie v. Stevenson*, 2d Robinson, 252. *Taylor v. Whittemore*, id. 100; 5th Robinson Rep. 266. *Armer v. Cockburn*, 4 Martin, N. S. 668.

Provision having been made in the judgment appealed from for any ultimate claims on the proceeds of the shipments, which the plaintiffs may substantiate, there is no ground for any change in the judgment.

The judgment of the District Court is, therefore, affirmed with costs.

JAMES MACKOY v. J. B. HOLTON & Co.

The usage, on the neglect, or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for any deficiency in the amount of sales.

It may be true, under the strict rules of pleading at Common Law, that a plaintiff is bound to affirm his contract by bringing his action for damages for the non-performance of it, or disaffirm the agreement *ab initio*, and bring his action for money had and received to his use. Under our practice, if defendants do not except and force the plaintiff to make an election, it is too late after evidence has been taken and trial had, to raise an objection of this character.

Facts that show an intention to rescind a contract.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Hite & Gaither*, for plaintiff and appellant. *Ogden & Duncan*, for defendants.

DUNBAR, J. This suit is brought on the following contract: "Foster, Kentucky, December 2, 1850. An article of agreement made and entered into between *J. B. Holton & Co.* (composed of *J. B. Holton*, *Wm. Pugh* and *Joseph Taylor*) of the first part, all of Bracken county, Kentucky, and *James Mackoy*, of Mason county, State aforesaid, of the second part, witnesseth: that the above named *J. B. Holton & Co.* have this day sold unto the above named *Jas. Mackoy*, their entire purchase of tobacco, supposed to be two hundred and fifty thousand pounds of leaf tabacco, more or less; *Mackoy* to receive the tobacco prized in the hogshead, *Holton* to receive the tobacco and prize it. The tobacco to be in good merchantable order and in good prizing order. *Mackoy* has the privilege of rejecting ten hogsheads of the entire purchase only, and this he is to have also, if they can agree on the price of it. And he, *Mackoy*, is to pay the sum of eight dollars per hundred pounds for all the tobacco so received, to pay five hundred dollars down, in the following manner: Two hundred and eighty dollars in hand, the receipt of which is hereby acknowledged, and give

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his individual note, due on the 25th December, instant, for the sum of two hundred and twenty dollars. It is expressly understood that this five hundred dollars, say, \$280 cash, and \$220 in his note, is given to bind the trade, and is forfeited on the part of said *Mackoy*, should he not comply with the stipulations following, which are as follows: *Mackoy* is to furnish the funds at the rate of eight dollars per hundred to *J. B. Holton & Co.*, as fast as it is needed, to pay the farmers as the tobacco comes in, besides the five hundred which has been mentioned before, in case he complies with the contract, then the five hundred dollars to be placed to his, *Mackoy's*, credit, as so much paid on the purchase, &c."

The plaintiff alleges that he has paid to the defendants, in part performance of this contract, seventeen hundred and sixty-five dollars, that he has always been ready and willing to perform his part of said agreement, but that the defendants have failed and refused to deliver the tobacco, when amicably thereunto requested, and moreover, in order to defraud him of his just rights, had shipped the tobacco to the city of New Orleans. He seeks to recover both the damages which he has sustained from the failure of the defendants to deliver the tobacco, in conformity with the contract, and the moneys he has paid them.

The defendants in their answer, admit the contract, as set forth in plaintiff's petition, and the payments to them of the sums of money mentioned therein, but allege that the plaintiff failed to furnish them with necessary funds to pay for the tobacco, as it was brought in by the farmers, as he was bound to do; that they delivered to the plaintiff, in part compliance with their contract, five hogsheads of tobacco on the 16th January, 1850, and that afterwards, when the tobacco came in very fast upon them, the money aforesaid, that had been paid to them by plaintiff, was quickly exhausted; that they notified him of the fact, and required and urged him again and again, to furnish them with more money, which he utterly failed and neglected to do. In consequence of which default on the part of the plaintiff, they, the defendants, were compelled to raise the money themselves to pay for the tobacco, and to ship it on their own account to their factors in New Orleans, *Schultz & Hadden*, and *Beatty, Leggett & Co.* The defendants plead in reconviction, allege that they have sustained damages from the default of the plaintiff to the amount of five thousand dollars, and that they have further the right to retain the five hundred dollars, the forfeit, or penalty incurred by plaintiff for his non-compliance with his contract.

The plaintiff commenced this suit by attaching the tobacco in the hands of the beforementioned factors in this city, who, also intervened, claiming a privilege upon the proceeds of the tobacco for advances made by them. The District Judge decided in their favor, to the extent of their advances, from which portion of the judgment no appeal has been taken. The case is therefore disembarrassed of any inquiry relative to the claims of the intervenors, and is to be decided by us solely upon the controversy between the original parties.

We agree with the District Judge, in the opinion, that it is shown by the evidence, that the plaintiff after having paid seventeen hundred and sixty-five dollars, and received five hogsheads of tobacco, failed to comply with his contract in furnishing the funds which he was bound to provide the defendants with, for the purpose of making payments to the farmers for their tobacco, as it was delivered by them to the defendants. It is also shown that the defendants were put to much inconvenience and expense in having to raise the money themselves. But we think it is likewise clearly established, that on the default of

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the plaintiff to furnish the necessary funds for the payment to be made for the tobacco, that the defendants elected to rescind the contract, and consider it forfeited by shipping the tobacco on their own account to New Orleans, a distant market, with the view of making a handsome speculation thereby. One of the witnesses says: "that he saw *Jesse B. Holton* on his way down from Maysville, and in conversation with him on that day, he told me that *James Mackoy* had forfeited his contract, and he thought he would make more money than if he, *Mackoy*, had complied with his contract; this conversation took place a few days after the contract was claimed to be broken, at which time the prospects of tobacco were very promising." The usage, on the neglect or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales. 2 Kents Com. 504. There is no usage or authority, with which we are acquainted, that authorises the vendor under such circumstances to ship the goods to a distant market for sale, and then charge the vendee with the difference in price. We do not understand the case of *Applegate v. Hogan*, 9th B. Monroe's Reports, to which we have been referred by defendants' counsel, as maintaining any such doctrine. The conduct of the defendants can be viewed in no other light than as a relinquishment of the contract, and if the contract be considered as rescinded, the buyer has a right to recover back the money paid. *Raymond et al. v. Bearnard*, 12 Johnson, 274. *Gillet v. Maynard*, 5 Johnson, 87. The same authority says, that if the contract is rescinded in part, it must be in toto; and the plaintiff's right to recover back the money paid, is undeniable. Believing, however, as we do, that the plaintiff was first in default in not furnishing to the defendants, the necessary funds to pay for the tobacco, in conformity to his contract; we do not consider that he is entitled *ex æquo et bono* to recover from them the forfeit, or penalty of five hundred dollars.

It is, however, contended by the counsel of the defendants, that the plaintiff in his petition has set up contrary, or inconsistent causes of action; that he was bound to affirm the contract, by bringing his action for damages for the non-performance of it, or he should have elected to disaffirm the agreement *ab initio*, and brought his action for money had and received to his use. Sugden's Law of Vendors, 173-4.

This may be true, under the strict rules of special pleading at Common Law, but not under our more liberal system. Before the adoption of the Code of Practice in the case of *Kenny et al. v. Dow*, 10th Martin, 601, it was held that after evidence had been taken and trial had such a defect was cured. This rule, reasonable in itself, has not been changed by our Code of Practice, arts. 149, 152. The defendants might have filed an exception and forced the plaintiff to make an election, but not having done so in the proper time, it is now too late.

The same objection might be made to the defendants' answer in reconvention. In that, they claim the penalty and sue for a breach of covenant; to which, in like manner, no exception was taken. Chitty on Contracts, 868.

Under our equitable system of pleading, we are enabled to do substantial justice between the parties without being driven to the necessity of dismissing both their claims.

After crediting the defendants with four hundred and twenty-four dollars, the value of five hogshheads of tobacco delivered to plaintiff, and allowing them to retain the five hundred dollars forfeit or penalty, there will be a balance due to plaintiff of eight hundred and forty-one dollars.

It is therefore ordered and decreed, that the judgment of the District Court be avoided and reversed, and there be judgment for the plaintiff against the defendants *in solido*, for the sum of eight hundred and forty-one dollars, with five per cent. per annum interest from judicial demand, to wit: the 27th of March, 1851, with costs in both Courts.

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THOMAS J. COOLEY AND SIDNEY A. LACOSTE v. CECILE, f. w. c.

It often occurs that the valuable services of counsel enure to the benefit of others than those who have employed them. Large interests often include small ones in matters of litigation. For such services counsel cannot recover against parties who did not employ them.

A PPEAL from the District Court of the Ninth Judicial District, parish of Point Coupée. Plaintiffs in *pro. per.* *Provosty* and *Roy*, for defendant and appellant.

EUSTIS, C. J. (SLIDELL, J. dissenting.) This suit is instituted to recover the amount of a fee for professional services, rendered the defendants by the plaintiffs, as attorneys and counsellors at law, in the case of *Marcelin Mayer et al. v. Virginie Eneault*, vide 7 Ann. Rep. The services were rendered in sustaining the will of Mr. *Simon Porche*. The amount claimed was five hundred dollars; the plaintiffs recovered the sum of three hundred and fifty dollars, and the defendant has appealed.

The succession, which was secured to the universal legatee by the services of the plaintiff, was valuable, and it is certain that, in maintaining the interests of their principal client, the defendant had the benefit of them. Her interest, however, was small comparatively, and was concurrent with that of the universal legatee in that suit. She had no separate interest to be defended, because if her legacy failed, it would have enured to the benefit of the principal defendant, the universal legatee, and we so decided.

The present defendant was made a party defendant in the suit, and the plaintiffs filed her answer as well as that of the principal defendant.

It is denied that the defendant ever employed the plaintiffs, and, it is contended by the plaintiff, that the fact is established by two circumstances: one is the signature of the defendant to a release in favor of a witness which was in the handwriting of one of the plaintiffs. We find, on examining the copy of the release, that it does not bear the signature of the defendant; it has a mark (X) which may have been intended for it. There is no explanation of the circumstances under which this mark was appended to the release, nor of the understanding of the party as to its purposes, and the uses to which it was to be applied. And we think that such an explanation ought to have been given, in order to bind the defendant by it to the extent contended for by the plaintiffs. But this shows the defendant was unable to write her name, and it would be obviously unjust to hold a person of this condition to the same knowledge and consequences which an act of this kind on the part of business persons would imply.

The other circumstance, relied upon to prove the plaintiffs' employment by the defendant, is their possession of the copy of the petition and citation served on the defendant. In considering the object of this suit we must again refer to

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47	1125
8	51
40	608
8	51
105	608
8	51
119	54

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the condition of the defendant, as to all legal matters, one of absolute dependence. The possession of these papers, it is plain, proves nothing except the fact. The plaintiffs were employed by those entrusted with the business of the universal legatee, and as no communication is proved to have taken place between them and the defendant before the trial, the case rests upon the weight to be attached to the release.

It often occurs that the valuable services of counsel inure to the benefit of others than those who have employed them. Large interests often include small ones in matters of litigation. As we said in the case of *Roselius v. Delachaise*, 5th Annual Reports, 481, for such services counsel cannot recover against parties who have not employed them.

Our impression is that it became the duty of the universal legatee, the testamentary executor having died, to sustain and execute the will. The plaintiffs maintained in their argument that the heirs had no right to impugn the rights of the defendant as long as the will stood unimpeached, inasmuch as they were without interest in respect to them. It is plain that the main defence covered the rights of the defendant, and the will being in operation, her only conflict was with their client, the universal legatee.

The appearance of the plaintiffs under ordinary circumstances would have been evidence of their employment; but in the present case the plaintiffs represented the main and controlling interest to be defended in another's right. The defendant's interest was small, and she was merely a nominal party in the suit.

The judgment of the District Court is, therefore, reversed, and judgment rendered for the defendant, with costs in both Courts.

STATE v. JEAN GEZE.

Information for selling spirituous liquors to slaves without consent of masters, &c. *Held*: If the owner of the slave, or person having him in charge, sent the slave to buy, or receive the spirituous liquor from the defendant, for the purpose of inducing the defendant to commit the offence charged in the information—then the act committed was done with the assent of the owner, or person having the slave in charge—and the material ingredient of the offence is wanting.

APPEAL from the District Court, Fourth District, Parish of Ascension. *Duf-fel, J. Attorney General*, for the State. *Miley*, for defendant.

DUNBAR, J. This is a prosecution, by information against defendant, for unlawfully selling spirituous and intoxicating liquors to a slave, without the consent and authorization of his master, or person having charge of said slave. The defendant was tried and found guilty by a jury, and condemned by the Court to a fine of five hundred dollars, with the costs of prosecution, and imprisonment for thirty days, unless the fine and costs were paid.

Upon the trial of this case, the counsel of the defendant moved the Court to instruct the Jury, if they should be of opinion, from the testimony adduced, that the owner of the slave, or the person having charge of him, sent the slave to buy, or receive the spirituous liquors from the accused, for the purpose of entrapping him and inducing him to commit the act charged, that the act so committed being done with the knowledge and assent of the owner, or person having charge of the slave, the material ingredient of the offence would be wanting, and that in

such case no offence was committed, as charged. The Court having refused to charge, as thus requested, the defendant took his bill of exceptions.

We are well aware of the solicitude which has been exhibited by our Legislature for a long series of years, in the passage of numerous Acts to prohibit the selling of intoxicating liquors to slaves, and have considered the subject with every disposition, if possible, to construe the Statute of 1832, under which the information in this case has been framed, so as to advance the remedy and suppress the mischief; but we have been unable to agree with the District Judge in his refusal to charge the Jury as requested.

The Act of 1832, with the several amendments thereto, imposes a fine "upon any person who shall give, sell or deliver, or cause to be sold, &c., to the slave of any other person, without the *consent and authorization* of the master or owner, or person having charge of such slave, any spirituous or intoxicating liquors, &c." Revised Statutes, p. 555. It is clear that the material ingredient in the offence under this Statute is "the giving, selling, &c., without the *consent and authorization* of the owner, or person having charge of such slave." If then the owner or person having charge of the slave sent him to the defendant for the purpose of *inducing* him to sell or give the spirituous liquors to the slave, with what propriety can it be said that the spirituous liquors were given or sold without the consent of the owner or person having charge of the slave?

It has however been contended by the *Attorney General*, that the Act of June 7, 1806, imposes a fine upon any person who shall sell intoxicating liquor to a slave without a permission *in writing* from the master. Bullard and Curry's Digest, 51. This is very true; but the defendant has not been informed against under that Statute, and if he had been, the fine imposed by it would not have been sufficient to give this Court jurisdiction. Unfortunately perhaps for the good of the community, this wise provision of the Act of 1806, requiring the permission of the master in writing, has been omitted in the Act of 1832, under which the defendant is now prosecuted. This case bears a striking analogy to that of larceny. One of the material ingredients in the offence of larceny is, that the taking of the goods should be without the *consent of the owner, invito domino*. In Eggington's case, reported in Russell on Crimes, 2 vol. 105, this material ingredient in the offence of larceny underwent great consideration, as the author tells us. The prisoners having been convicted, the case was argued before the twelve judges, a majority of whom held that the prisoners were guilty of the larceny under the following circumstances. It appeared that the prisoners, intending to rob a manufactory at Soho, near Birmingham, of which *Mr. Boulton* was the principal proprietor, applied to a man named *Phillips*, who was employed as servant and watchman to the manufactory, to assist them in the robbery. *Phillips* assented to their proposal, but immediately gave information to *Mr. Boulton*, who told him to carry on the business, with a view to the detection of the thieves, which the servant accordingly did. The conviction of the prisoners was founded upon the consideration that although *Mr. Boulton* had permitted or suffered the meditated offence to be committed, he had not done anything *originally to induce it*; that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. From this report of the case it is to be inferred that if *Mr. Boulton* had done anything *originally to induce* the commission of the theft, the prisoners would have been acquitted. So we think, if

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the owner of the slave, or the person having him in charge, sent the slave to buy or receive the spirituous liquors from the defendant, for the purpose of *inducing him* to commit the offence charged in the information, that the act so committed being done with the assent of the owner or person having charge of the slave, the material ingredient of the offence would be wanting, and that in such case no offence was committed, as charged.

It is therefore ordered, that the judgment of the District Court be avoided and reversed, that a new trial be awarded the defendant, with instructions to the District Judge to charge the Jury in conformity to the principles of this opinion and decree.

SEBASTIAN HIRIAT *v.* HARRIET HILDRETH, widow, &c.

Where issue has not been joined before the death of the original plaintiff, no judgment can be had before notice to the defendant of the revival of the suit.

APPEAL from the District Court, Sixth District, Parish of Iberville. *Robertson, J. Edwards*, for plaintiff. *Labauve*, for defendant and appellant.

DUNBAR, J. The plaintiff in this suit died after service of citation on defendant, but before issue joined.

On the 6th September, 1852, on motion of *W. E. Edwards*, counsel for plaintiff, it was ordered by the District Judge, that the cause be transferred from the dead to the trial docket; and the said counsel having suggested the death of *Sebastian Hiriart*, and filed letters of administration to *Paul Louis Hiriart*, it was ordered that the said *Paul Hiriart*, administrator, be made a party to the suit. There does not appear to have been any service of this order of revival upon the defendant or her attorney, and the plaintiff's counsel on the next day obtained from the Court a judgment by default against her, which was made final a few days thereafter, without any appearance or defence on behalf of the defendant.

On the same day, however, on which the judgment was made final against her, the defendant came into Court with her counsel and moved for a new trial, upon the ground that both the judgment by default and final judgment against her were irregular and illegal. The District Judge overruled this motion, and the defendant has appealed.

We think the District Judge erred. If there had been a *contestatio litis* before the death of the original plaintiff, the proceedings would have been regular, but not otherwise. *Carlisle v. Holdship*, 15th La. 375. Where there has been no issue joined before the death of the original plaintiff, the defendant should be notified of the revival. *Licquet's Heirs v. Pierce*, 5th La. 363.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed, and the case remanded for further proceedings—the costs of this appeal to be paid by the appellee.

WILHELMUS BOGART *v.* JEAN BTE. RILS.

An action for the recovery of land will not bar the plaintiff from suing out an injunction against defendant's committing waste, nor deprive him of his right to sequester timber cut from the land.

APPPEAL from the District Court, Sixth District, Parish of Iberville. *Burk, J. Edwards*, for plaintiff and appellant. *Talbot*, for defendant.

DUNBAR, J. A petitory action for the recovery of a tract of land adjacent to the Mississippi, was instituted in 1846, by one *Blanks* against one *Marionneauz* and others. All the defendants in that action except *Marionneauz*, adjusted their difficulties with the plaintiff, so that the suit exists really only between them. That suit is still pending in the same court from whence the present appeal has been taken. In 1850, *Blanks* and *Marionneauz* sold their respective claims to the present plaintiff and defendant. This action, instituted in 1852, was for the purpose of enjoining the defendant, *Rils*, from committing waste on the land in controversy during the pendency of the suit, and obtaining a sequestration of some timber that defendant had already cut down thereon, and was about to carry off. The injunction and sequestration issued agreeably to the prayer of the petitioner, who in his petition makes especial reference to the pending suit between *Blanks* and *Marionneauz*. The defendant, *Rils*, excepted to answering the plaintiff's petition, and prayed that it might be dismissed, "as another suit for the same cause of action was pending." The District Judge sustained the exception, from which opinion the present appeal has been taken.

It will simplify this case to consider it as one between the original contestants, *Blanks* and *Marionneauz*, and in doing so, (which is most favorable to the defendant,) we are of the opinion that, during the pendency of the suit, plaintiff had a right to the conservatory remedies asked for; indeed, from the nature of the sequestration it could only arise during the pendency of the suit. It is not, strictly speaking, a new action; rather a branch of the old, and ought to have been cumulated with it. The class of exception which prohibits two suits being brought before different tribunals for the same cause of action, the parties being the same, (see C. P. art. 835, sec. 2,) was obviously framed to shield defendants from the harassing effects of a multiplicity of suits before different tribunals, for the same cause of action, by the same plaintiffs. But we cannot understand it to mean that a party is precluded from filing an additional, or supplemental petition, necessary, as in this case, for the preservation of what he may deem his rights, during the pendency of the original action, and to which he is forced by the act of the defendant himself. The petition in the present case, to be sure, does not pray that it may be cumulated with the prior suit; but that, we consider, does not impair the right of the plaintiff to have the conservatory order granted, and damages allowed. Upon due proof the Court might, *ex officio*, have ordered the two to be cumulated, according as it might have served to the despatch of business, without prejudice to the interests of the parties litigant, and we shall leave that to its discretion.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be annulled, avoided and reversed; the exception filed by defendant be overruled, and the cause remanded for further proceedings—according to law, the appellee paying costs of the appeal.

CHARLES MORGAN, Administrator, v. JACOB COFFMAN.

In the case of *Coffman v. Williams*, on a sale, *Cresup* as principal and *Morgan* (deceased) as surety, gave a twelve months' bond for the price of the property. On the 19th of July, 1849, the Sheriff had an execution on the bond, against *Cresup* and *Morgan*, and was about to levy, when, on the same day, *Hudson*, the attorney at law of *Coffman*, and the Sheriff, meeting *Cresup*, *Hudson* directed the Sheriff to return the execution, and took *Cresup's* draft on *Fellowes, Johnson & Co.*, of New Orleans, payable to *Hudson's* order, on the 1st of the following November. *Hudson* endorsed the draft "without recourse," and forwarded it to *Coffman*, who kept it "a long time." The draft was neither accepted nor paid by *F., J. & Co.*, in whose hands *Cresup* had no funds. Held: If *Coffman* did not approve of *Hudson's* arrangement, he should have ordered a new execution and returned *Cresup's* draft. His long acquiescence discharged the surety.

APPEAL from the District Court, Ninth District, Parish of Point Coupée, *Farrar, J. Lacoste*, for plaintiff. *Ratliff*, for defendant and appellant.

Plaintiff's counsel cited: 5 Ann. 222; 11 Rob. 38; 10 Rob. 419; 4 Rob. 376.

Defendant's counsel contended that there was no such granting of time as impaired the remedies of the surety against the principal, and cited *Buckner v. Watt*, 19 L. R. 211; *State Bank v. Harralson*, 2 Ann. 456; *Perkins v. Bank of Louisiana*, 5 A. 225, 16 L. R. 133.

DUNBAR, J. This is an injunction sued out by the administrator of *Charles Morgan*, deceased, to restrain the defendant from proceeding upon an execution issued on a twelve months' bond given in the case of *Coffman v. Williams*, by *John V. Cresup*, as principal, and *Charles Morgan*, deceased, as surety. The plaintiff alleges that the surety has been released by the giving of time to *Cresup*, the principal, by *Coffman*, without the consent of the surety. The District Judge made the injunction perpetual, and the defendant has appealed.

It appears from the evidence of the Sheriff of the Parish of Pointe Coupée, that, on the 19th of July, 1849, he had in his hands an execution issued on the above twelve months' bond, against *Cresup* and his sureties, and on the same day, he was about to levy the said execution, in company with *H. C. Hudson*, the attorney-at-law of *Coffman*, when they met with *Cresup*, the principal on said bond, and demanded payment of the execution, who told them that he had funds with *Messrs. Fellowes, Johnson & Co.*, of New Orleans, and would give a draft on them for the amount. That *Mr. Hudson* took the draft as proposed, on *Fellowes, Johnson & Co.*, payable to his own order, on the first day of November thereafter, and ordered the execution to be returned, which was accordingly done. It further appears, that the draft was endorsed by *Hudson* without recourse, and forwarded to *Coffman*, who having kept it a long time, in the language of the witness, returned it to him, who produced it on the trial of the cause, the same never having been accepted or paid by *Fellowes, Johnson & Co.*, one of whom, in his deposition in the case, declares that *Cresup* had no funds in their hands and had no right whatever to draw on them.

Under this statement of facts, we think the surety is discharged. If *Coffman* did not approve of the return of the execution ordered by his attorney, and the taking of the draft which was forwarded to him, he should immediately have dissented and ordered another execution; his long acquiescence in this arrangement must be considered as a prolongation of the term granted to the principal debtor without the consent of the surety, which operates a discharge of the latter. Civil Code, Art. 8032. See also the case of *John R. Shaw & Co. v. John Nolan*, ante p. 25.

The judgment of the District Court is, therefore, affirmed, with costs.

SUCCESSION OF IRA SMITH.

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When all the parties interested in the judgment have not been made parties to the appeal, the appeal will be dismissed.

A PPEAL from the District Court, Sixth District, *Farrar, J. Ratliff*, for appellant. *Winter, Brewer and Collins*, for executrix. *U. B. & E. P. Phillips* and *W. J. Lyle*, for appellees.

SLIDELL, J. In 1851, *Mrs. Smith*, who had administered the succession of her deceased husband, as executrix of his will, filed in the Court where his succession was opened, an account of her administration, showing her receipts and expenditures. She also filed a statement of outstanding debts and probable expenses of settling the estate, and represented that a sale would be necessary to pay them. Other matters pertinent to the administration were presented. An opposition was filed by the attorney of the absent minor, *Ira Smith*, a legatee under the will. After the usual publications, trial, &c., the Court below rendered a judgment in which it acts upon the objections to the account, settles the pretensions of the widow and others interested, fixes the amounts due various banks and other creditors, directs a sale of certain property and the payment of enumerated debts from its proceeds, and commands commissions to issue to the Sheriffs of the respective parishes where the property was situated, to effect the sales. This judgment was signed in April, 1852, and, it is said, has been executed by sales and payments. In the same month, an order at chambers appears to have been made by the Judge, upon a petition presented by the minor's attorney, allowing a devolutive appeal upon condition of the appellant giving bond "in the sum of two hundred dollars, conditioned according to him." The petition appears not to have been filed in the clerk's office until December, 1852, in which month an appeal bond was executed in favor of *Mrs. Smith*, executrix, only; and in January, 1853, citations were issued and served upon the attorney of absent heirs, the executrix, and *Sarah Smith* and husband, she being a legatee. These persons, with *Mrs. Lyle*, being the only persons whom the petition of appeal prayed might be cited.

Mrs. Smith and *Mrs. Sterling* have moved to dismiss the appeal upon various grounds, one only of which need be considered, and this is that all the parties interested in the judgment, have not been made parties to the appeal.

We think the ground of dismissal well taken. The creditors of the succession have an important interest in maintaining the judgment; they have not been cited, and their citation was not asked by the appellant. No bond of appeal was given in their favor, either by naming them in the bond, or by using any personal words which would comprehend them. The relief asked by the appellant seriously concerns their interests, and a reversal of the judgment ought not to be had without citing them. See 2 Annual, 546, 994; 6 Rob. 303; 3 Rob. 436.

It is therefore decreed that the appeal be dismissed at the costs of the appellant.

WM. GUESNARD v. B. & A. SOULIE.

The effect of the pact *de non alienando*, so far as the party in whose favor it operates is concerned, is, that in contemplation of law, the property remains in the possession of the original debtor, notwithstanding it may have been alienated by him; and those who purchase it, or acquire real rights on it, are presumed to know the titles and incumbrances under which they hold.

The mortgagee, in such a case, has a right to proceed by the *via executiva*, after the alienation, as if the property still belonged to the mortgagor.

APPEAL from the First District Court of New Orleans, *Larue, J. Maurian*, for plaintiff. *Eyma and Seghers*, for defendants and appellants.

Rost, J. At a Sheriff's sale made under an order of seizure issued upon a mortgage duly recorded and containing the pact *de non alienando*, the plaintiff became the purchaser of a house and lot, and was required on the spot to pay into the Sheriff's hands the entire amount of his bid.

The certificate of mortgages showing no other conventional mortgage existing on the property, the Sheriff paid the claim of the seizing creditor and the costs of suit, and gave the balance in his hands to the husband of the defendant, *Mrs. Clinton*.

It appears that *Mrs. Clinton*, after giving this mortgage, had sold the land to one *John Bartley*, who gave her in part payment his note for \$800, secured by mortgage on the property. This note is now in the hands of the defendants, and they have taken upon it an order of seizure and sale which the plaintiff has enjoined. This is an appeal from the judgment perpetuating the injunction.

The effect of the pact *de non alienando*, so far as the party in whose favor it operates is concerned, is, that in contemplation of law, the property remains in the possession of the original debtor, notwithstanding it may have been alienated by him; and those who purchase it or acquire real rights on it, are presumed to know the titles and incumbrances under which they hold. *Donaldson v. Morel*, 2 L. R. 84.

The mortgagee, in such a case, has a right to proceed by the *via executiva*, after the alienation, as if the property still belonged to the mortgagor. *Murphy v. Gandot*, 2d R. 378; *Gas Bank v. Allen*, 4 Rob. 389; *Ducros v. Forbin*, 9 Rob. 167. The mortgage creditor, in this case, thus proceeded and gave notice of the seizure to *Mrs. Clinton*; the subsequent alienations being null as to him, he had nothing to do with the mortgages resulting from those alienations, and the plaintiff, who holds under him, stands in the same situation. If he could be evicted by the defendant's mortgage in this action, under article 711, C. P., and 2599 C. C., he would have his recourse in warranty against the mortgagor and mortgagee, and thus effect would be given against the latter to an alienation which the law reputes null and void as to him.

The proceedings in the suit, were carried on against *Peter Clinton* and his wife, and if the Recorder of Mortgages was not informed that they had alienated the property, it is not surprising that he did not certify the existence of mortgages resulting from that alienation.

The authorities cited to show that the mortgage once created and inscribed continues to affect the property until the extinction of the debt, and that the Recorder cannot destroy it by his act or omission, are not applicable to this case.

The mortgage held by the defendants was taken under the implied condition which they are presumed to know, that in a certain contingency, the title under

which it arose might be treated as a nullity, and the injury resulting to them from the happening of that condition, is not one which the party in whose favor it existed, or those claiming under him, can be called upon to redress. The case would be a very hard one, if the loss of the defendants did not mainly result from the nature of the security they held, and from their not using the degree of diligence which such a security renders necessary. Those who hold second mortgages should, at all times, be informed of any proceedings which may have been had under the first. The property, in this case, sold for an amount more than sufficient to pay both mortgages, and the want of vigilance of the defendants alone, enabled their debtor to commit a fraud upon them.

Judgment affirmed with costs.

GUTHRIE
v.
BOULE.

LUCY BROWN, f. w. c., v. PERSIFOR F. SMITH,
SEWELL T. TAYLOR, warrantor.

The plaintiff was a slave in 1823. Her master was about removing from the District of Columbia to New York, and an indenture of apprenticeship of plaintiff, was made by her father to her master, to bind plaintiff until her majority. Her owner executed an act of manumission of plaintiff, and in the year of 1848, entrusted it to a gentleman of this city. *Held*: It seems as though the act of manumission and indenture were made with a view to the change of residence which followed and most clearly manifest the intention of removing to New York, by the laws of which, in force at the time of the change of residence, it is provided, that any person, not being an inhabitant of that State, who shall be travelling to or from, or passing through the State, may bring with him any person lawfully held by him in slavery, and may take such person with him from the State; but the person so held in slavery shall not reside, or continue in New York, more than nine months, and if such residence be continued beyond that time such person shall be free. The intention to reside in New York, and the actual residence there for, certainly, a year, being proved, the plaintiff became free.

The plaintiff's condition as a free person, could not be affected by the subsequent return to, and residence of her former owner with her, in the District of Columbia, as by a statute of Maryland, of 1796, it is provided that "It shall not be lawful to import, or bring into the State, by land or water, any negro, mulatto or other slave, for sale or to reside within the State, and any person brought in the State as a slave, contrary to this act, if a slave before, shall thereupon, immediately cease to be the property of the person or persons so importing, or bringing such slave within the State.

A PPEAL from the Third District Court of New Orleans, *Kennedy, J. J. D. Mix and Bonford*, for plaintiff. *Benjamin & Micou*, for defendant. *Elmore & King*, for warrantor and appellant.

ECTIS, C. J. This is an appeal taken by the defendants from a judgment of the Third District Court of New Orleans, by which the plaintiff and her two children are decreed to be free.

It appears by the evidence that the plaintiff, who is a negro woman, was born a slave, and in the year 1823, belonged to *Elijah Mix*, and lived in the service of her master with his family, in the District of Columbia; that some time in that year, *Mr. Mix* removed with his family to New York, and fixed his residence there; that early in 1825, he removed back to Georgetown, and in 1829, he removed back to New York, and that the plaintiff lived in his service during this time; that she was afterwards, in 1832, in the service of *Capt. Wells*, of the U. S. Army, in this city, as a slave, who sold her to *Sewell T. Taylor*, from whom *General Smith*, her present owner, purchased her.

By the law of New York, in force at the time of the change of residence by *Mr. Mix*, it is provided, that "any person not being an inhabitant of that State,

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who shall be traveling to or from, or passing through the State, may bring with him any person lawfully held by him in slavery, and may take such person with him from the State; but the person so held in slavery shall not reside or continue in this State more than nine months, and if such residence be continued beyond that time, such person shall be free."

An instrument of writing was produced at the trial, on behalf of the plaintiff, and acknowledged before the Mayor of Georgetown, on the 8th day of May, 1823. It purports to be an indenture of apprenticeship of *Lucy Brown*, in favor of *Elijah Mix*, of Georgetown, as his servant and waiting maid, until she shall attain the age of twenty-one years. It is signed with the mark of *Lucy Brown* and her father, *Harry Brown*, and *Elijah Mix*. This instrument is witnessed by *Samuel Cooper*, an officer in the Army of the United States, who has testified to his signature, though he has no recollection of the instrument.

There was a bill of exceptions taken to the introduction of the deposition of a free negro woman named *Cecilia Markle*, taken under a commission in Washington city, on the ground of incompetency of the witness to testify in a suit in which a Christian white person is concerned, under a statute of Maryland.

The question raised by this bill of exceptions there is no necessity for deciding, inasmuch as we have come to our conclusions independent of the testimony of this witness. And we think the evidence is too clear in favor of the plaintiff's right to her freedom, to require any notice of the charge of the Judge to which exceptions have been taken by the counsel for the plaintiff.

We do not think the force and effect of the indenture, as a piece of evidence, is weakened by the circumstance of there being no evidence of the time of its delivery; nor do we deduce any unfavorable impression from its appearance, nor find any ground for not giving to it the effect of an instrument in the possession of a party interested in procuring it.

It also appears in evidence that, in 1849, the plaintiff entrusted to a gentleman of the bar of this city, an act of emancipation of *Mr. Mix*, in her favor, dated in 1823. This paper has been lost, but we think there is evidence of its existence and purport.

Neither of these instruments, let us admit, had any legal effect, but they point to the conclusion that the plaintiff was to have her liberty so far as the intention of her master could give it to her, and are explained by the fact of his projected removal from Georgetown to New York. She could not remain in servitude for more than nine months after her arrival in New York, and the purpose of the indenture was to secure her services until she was twenty-one. She was, at the time, fifteen, and hence the wish of her father that she should be under the protection of her master's family until her majority. It seems to us as though the act of manumission and indenture were made with a view to the change of residence which followed, and most clearly manifest the intention of removing to a State in which the condition of the slave would be changed by it.

The purpose and intention of removing to New York and to reside there, we think, unquestionable. The fact of residence in New York, we think, is equally so. The evidence is not reconcilable as to the precise time beyond a year. It was not less than that period, and was probably several months longer. It was not in the same place. Part of the time, *Mr. Mix* lived in the city, and part in the country; but the evidence satisfies us that, at the time, he had neither residence nor domicile elsewhere than where his family resided.

Her freedom thus established under the laws of the State in which her master

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resided, would have been maintained under the laws of this State, had she been brought here after the establishment of her freedom in 1825. It appears that *Mr. Mix* having obtained a government contract, removed back to Georgetown with his family, and took the plaintiff with him in the fall of that year.

It is contended by the counsel for the defendant, that there was no real change of domicile in 1823, by the removal to New York, and that under the jurisprudence prevailing in the District of Columbia, the effect of the law of New York could do no more than suspend the exercise of the master's rights upon the slave during their sojourn, and that on their return to Georgetown, the original status of slavery reattached. The cases referred to in support of this doctrine, are *Adam v. Leverton*, 2 Harris & McHenry, 382, and *Mahony v. Ashton*, 4th id. 305. These cases were determined by the Supreme Court of Maryland, in 1789 and 1799.

In relation to the change of domicile on the part of *Mr. Mix*, in 1823, we have to observe that there is no circumstance in evidence which weakens the effect of the positive testimony of *Col. Cooper*, as to the removal to New York, and that of the son and daughter of *Mr. Mix*, who though at an early age at the time, must be considered as speaking according to the traditions of the family, as well as on their own recollection of the event. This concurrence of fact and intent is not impaired by the removal back to Georgetown, in 1825, because a new cause is assigned for the change of residence, to wit: the having obtained a contract from the Government. We must also bear in mind that the continuance of the plaintiff in the service of the family, after their return to Georgetown, though consistent with servitude as a condition, is also consistent with her apprenticeship, and that this service continued in the family after their return to New York, in 1829 and 1830.

The first case cited, that of *Adam v. Leverton*, does not appear to have any direct bearing in the question; the other is decided on the effect of a statute of Maryland, then in force.

It appears in that case, that *Ann Joice*, a negro woman, was carried with her owner, *Lord Baltimore*, claiming her as a slave, from the Island of Barbadoes to England, and afterwards brought to Maryland by him, claiming her as his slave, between the years 1678 and 1681, and that she, during her life, was held and treated as a slave, and that her issue had been held as slaves ever since. The Court of Appeals, in giving judgment, said: "By a positive law of this State, in 1715, then the province of Maryland, the relation of master and slave is recognized as then existing, and all negro and other slaves then imported, or thereafter to be imported into this province, and all children then born or thereafter to be born of such negroes or slaves, are declared to be slaves during their natural lives. This case being brought before this Court by original proceedings, we are of opinion that it must be governed by the laws of this State, and that, in this case, however the laws of Great Britain in such instances operating upon such persons there, might interpose so as to prevent the exercise of certain acts by the master, not permitted as in the case of *Somerset*; yet, upon the bringing *Ann Joice* into this State, then the province of Maryland, the relation of master and slave continued in its extent, as authorized by the laws of this State, and therefore the judgment of the general Court must be reversed, &c."

We are relieved from the inquiry, whether the plaintiff, by her return to Georgetown in the service of *Mr. Mix*, would fall into the condition of a slave, by a statute of Maryland, passed in 1796, and the decision of the Court of

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Appeals under it. That statute provided that "it shall not be lawful to import or bring into this State, by land or water, any negro, mulatto or other slave, for sale or to reside within this State; and any person brought into this State as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this State, and shall be free."

We find this statute adjudicated upon as late as 1820. See *Baptiste v. De Valembrun*, 5 Harris & Johnson, 95. We therefore conclude that the plaintiff's condition as a free person, was not affected by her return, in the service of *Mr. Mix*, to Georgetown, in 1825.

It appears that the plaintiff was first known in Louisiana, in 1831, at Fort Wood, as the slave of *Capt. Wells*. *Mr. Mix* resided in New Orleans from 1838 till his death, several years since, and the plaintiff's condition, as a slave, does not appear to have been drawn in question until this suit, instituted in May, 1851. From this state of things, the law establishes no presumptions which can defeat her right to freedom if once legally established.

Under the jurisprudence of this State, we think the judgment in favor of the plaintiff must be maintained.

This case was tried by a jury, and they allowed the sum of five dollars per month for wages from the service of the citation; the plaintiff took judgment on the verdict without any application for a new trial. An amendment of the judgment is asked in this Court, allowing her \$20 per month, for 12 months prior to the institution of this suit. The sum allowed is certainly small, but in looking at the testimony, we find it too loose and unsatisfactory on this subject, to authorize us to increase it.

The judgment of the District Court is therefore affirmed with costs.

There was an application for a rehearing in this case, resting upon a supposed erroneous interpretation of the statute of Maryland, of 1796. The statute is in the following words:

CHAPTER LXVII.

An Act relating to negroes, and to repeal the Acts of Assembly therein mentioned.

Be it enacted by the General Assembly of Maryland, That it shall not be lawful, from and after the passing of this Act, to import or bring into this State, by land or water, any negro, mulatto or other slave, for sale, or to reside within this State; and any person brought into this State as a slave, contrary to this Act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this State, and shall be free.

II. *Provided, nevertheless, and be it enacted*, That it shall and may be lawful for any citizen or citizens of the United States, who shall come into this State, with a *bona fide* intention of settling therein, to import or bring into this State, at the time of his or her removal into this State, or within one year thereafter, any slave or slaves, the property of such citizen at the time of his or her said removal, which slave or slaves, or the mother or mothers of which slave or slaves, shall have been resident of the United States, or some one of them, three whole years next preceding such removal, and the same to retain as slaves.

III. *And be it enacted*, That nothing herein contained shall be construed to enable any person or persons, so removing as aforesaid, to sell or dispose of any slave or slaves imported by virtue of this act, or their increase, unless such person or persons shall have resided within this State three whole years next preceding such sale, except in cases of disposition by last will and testament, and dispositions by law for *bona fide* debts, or consequent upon intestacy.

IV. *And be it enacted*, That nothing in this Act contained shall be construed or taken to affect the right of any person or persons traveling or sojourning

with any slave or slaves within this State, such slave or slaves not being sold or otherwise disposed of in this State; but carried by the owner out of this State, or attempted to be carried.

Passed 31st of December, 1796.

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ECSTIS, C. J. A rehearing has been applied for on the part of the defendants in this case, for the purpose of reconsidering the effect of the Statute of Maryland of 1796.

Having come to the conclusion on the evidence, that the plaintiff was not a slave on her return to Georgetown, in the service of her master, early in the year 1825, and that her residence at that time was in New York, and that he was not in any sense an inhabitant or citizen of the State of Maryland, according to the adjudged cases of the Supreme Court of Maryland, the plaintiff would not be held reduced to bondage by her return to that State.

In the case of *Bland v. Woolfolk*, 9th Gill & Johnson's Reports, 19, determined under this Statute of 1796, it was held that if a negro slave, with the permission of his owner, takes up his residence in another State, such owner cannot resume his property in him after his return to the State, either for the purpose of servitude within the State, or sale to a citizen of Maryland, *even* although the return of the negro originally was against his master's consent.

So in *Cross v. Black*, *id.* p. 199, it was decided that a citizen of Maryland, intending to break up his establishment, and leaving the State with his slaves, with an avowed design of becoming a resident of another State, and actually going out of the State in pursuance of such design, may, before he reaches the point of his intended destination, change his purpose and return with his slaves, without forfeiting his title to them. To subject him to such forfeiture there must be an actual consummated design to remove and place them elsewhere permanently.

We are therefore satisfied that our conclusions, that under the Act of 1796, the plaintiff is entitled to her liberty, are in accordance with the settled jurisprudence relating to that Statute in the State of Maryland.

The Court of Appeals of Kentucky have in a recent case, not reported in full, *Ferry v. Street*, decided in the same sense in relation to a slave who had acquired her freedom under a Statute of Pennsylvania, by remaining in that State, with the consent of her mistress, for more than six months.

The application for a rehearing is therefore refused.

CHARLOTTE WILLIAMS and Husband v. MICAJAH COURTNEY, et al.

When an appeal is taken by the plaintiff, and the names of the warrantors, who are immediately interested, do not appear, either directly, or by implication in the appeal bond, the appeal will be dismissed.

APPEAL from the District Court, Ninth District, Parish of Point Coupée.
A. Farrar, J. Ratliff, for plaintiffs and appellant. *J. H. Collins and U. B. Phillips*, for defendants.

ROSE, J. A motion to dismiss this appeal has been made on the ground that all the parties having an interest, that the judgment of the District Court should

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remain undisturbed, have not been made parties; and also on the ground that no appeal bond, such as the law requires, has been given.

The defendant being sued for an undivided interest in a tract of land, called in warranty his vendors, who appeared and joined in the defence. The judgment below was in favor of the defendants generally. The appeal was granted on motion in open Court, but the bond given does not contain the names of the warrantors expressly, nor any general expression, such as the words "and others," or "other parties interested." None of the defendants except *Micajah Courtney*, can therefore be considered as parties to the appeal. See the case of *Brigham et al. v. Taylor et al.*, 2nd Annual, 906.

The warrantors are the parties upon whom the loss is to fall in case the judgment should be reversed. They have therefore a direct interest that it should remain undisturbed, and under the uniform jurisprudence of this Court the appeal cannot be sustained. 12 R. R. 203. *Guiron v. Bagnerie*, 9 L. R. 471. *Curry v. Roberts*, 12 L. R. 474. *Oliver v. Williams*, 12 R. R. 183.

The agreement entered into by the counsel of all parties,* was simply that the judgment might be rendered at Chambers, and an appeal granted on motion of any of the parties, as though taken in open Court; it contains no waiver of the only manner in which appellees can be brought in Court to answer appeals taken by motion.

In the case of *Thomas Beard and others v. B. Poydras*, 13 L. R. 83, which seems, as reported, to favor the view of the appellant, the argument was that the case should be continued as to the warrantors and other parties to the suit, until the decision of the case between the plaintiffs and some of the defendants.

It is therefore ordered, adjudged and decreed, that the appeal taken in this case be dismissed, with costs.

NOLAN STEWART v. J. R. ALLAIN et al.

A purchaser at sheriff's sale can compel the recorder to erase from his books of record a judicial mortgage, the registry of which is posterior in date to that of the mortgage under which the property was sold, so far as the same bears upon the property purchased.

APPEAL from the District Court, Sixth District, *Burk, J. J. M. & J. E. Elam*, for plaintiff and appellant. *Brandt, Grieves, Beale and Sherburne*, for defendants.

Rost, J. The only question which this case presents on the appeal, is whether a purchaser at sheriff's sale, can compel the recorder to erase from his books of record, a judicial mortgage, the registry of which is posterior in date to that of the mortgage under which the property was sold.

The same issue in the case of an anterior judicial mortgage, was before us in the case of *Samuel P. Young v. Municipality No. One*; and we then held that no provision was made by law for removing such an incumbrance. 5 Annual 786. It was decided in that case, that article 684 of the Code of Practice prohibiting a sale of property under execution, if the price offered does not exceed

* The agreement of counsel is in the following words: "The parties to the above entitled suit consent that judgment be rendered at Chambers on the testimony offered on the trial. They also consent to an appeal being granted by the Judge, on motion of any one of the parties, as though taken in open Court, waiving citation of appeal."

the amount of the privileges and mortgages with which it is incumbered, refers to special and not to general mortgages. Art. 708, however, providing that the purchaser is bound for nothing beyond the price of his adjudication, and that if after paying the creditor, there remains nothing more due, to discharge the mortgages subsequent to that of the suing creditor, the sheriff shall give him a release from these mortgages, has received a different interpretation and has been held to apply to judicial as well as to conventional mortgages. *Fortier v. Slidell*, 7 R. 398. *Lagourge v. Summers*, 8 R. 175. *Passibor v. Prieur*, 1 Annual 10.

We feel bound to adopt that interpretation.

The plaintiff purchased under a mortgage consented by *Dempsey P. Cain*, in favor of the Clinton and Port Hudson Railroad Company. He is entitled to have all the subsequent mortgages existing on the property mortgaged to the company, erased from the public record. A large number of slaves upon which it had no mortgage, were sold at the same time; upon these, of course, the judicial mortgage of the appellees must remain.

We have not found it necessary to notice the plea of simulation set up by the appellees. The judicial sale of the property vested the title in the plaintiff and must have its legal effect.

It is ordered, that the judgment be reversed. It is further ordered, that the recorder of the parish of West Baton Rouge, enter on the books of record of mortgages, a release of the judicial mortgage of *Hewitt, Heran & Co.* against *Dempsey P. Cain*, so far as it bears upon the following property: one tract of land lying and being in the parish of West Baton Rouge, fronting on the Mississippi river and bounded above by the lands of the heirs of Brock, and below by the lands of him, said Cain, containing eight hundred arpents, more or less; one negro man named *Dennard*, aged twenty-seven years; one negro woman named *Daphne*, aged about thirty-eight years; one man named *Guy*, aged about thirty-five years; one child named *Jacob*, son of *Daphne*, aged eight years; one girl named *Louisa*, aged sixteen years; one woman named *Clarissa*, aged about eighteen years; one boy named *Harkwell*, aged twelve years; one boy named *Edmund*, aged eighteen years; one man named *Hampton*, aged twenty-nine years; one woman named *Coley*, aged fifty years; one woman named *Maria*, aged twenty years; one boy named *John*, aged nineteen years; one girl named *Charlotte*, aged fifteen years, all slaves for life.

It is further ordered, that the defendants pay costs in both Courts.

E. PORCHE, Curator, v. CREDITORS OF THE SUCCESSION OF JOHN G. BANKS.

An administrator of an Estate is bound, legally and morally, to manage its affairs with at least as much prudence as he would his own, and, if disregarding it, he pays more for services, professional, or otherwise, rendered the Succession, than they could have been procured for, he violates his duty, and must bear the loss.

If an administrator unadvisedly institutes suit, the Estate ought not to suffer loss by it.

A PPEAL from the District Court, Fifth District, Parish of Terrebonne, *Randall, J. Hall*, for Plaintiff. *Beatty*, for Heirs of Banks, opponents and appellants.

POURCE
OF
CREDITORS OF THE
SUCCESSION OF
J. G. BARRAS.

DUNBAR, J. The Heirs of *William Banks* are appellants from a judgment homologating the account filed by the present Curator. Their opposition is confined to the amount of commissions allowed the present and former curators, and to the amounts paid *J. L. Cole* and *Winchester Hall* for legal services rendered the succession. The commission of \$176 82, allowed *L. E. Barras* the former curator, was settled by the homologation of his account in September, 1848, and is not now a subject for investigation.

The commissions of the present curator were properly charged on the amount of funds which came into his hands. See C. C., arts. 1189 and 1200, and case of *Smith*, admr. v. *Cheney*, admx., 1 Robinson, 98.

The amounts paid to *J. L. Cole* and *W. Hall*, as attorneys for the curators, *Barras* and *Porche*, are opposed, mainly upon the grounds that they are excessive. At the time of the rendition of the account, *J. L. Cole* had already received \$2650, and filed an opposition claiming to be paid \$800 additional. The opposition was sustained to the extent of \$290 00, making his compensation altogether \$2940. The amount paid to *W. Hall* was \$1950, which was ratified by the Court.

We have given our most attentive consideration to the evidence adduced in support of these claims, and the conclusions arrived at do not support the opinion of the District Judge. An administrator of an estate is bound legally and morally to manage its affairs, with at least as much prudence as he would his own, and if, disregarding it, he pays more for services, professional or otherwise rendered the Succession, than they could have been procured for, he violates his duty, and must bear the loss.

In the present case, had the curator made the proper exertions, he could, as the evidence establishes, have obtained gentlemen of the bar, possessed of ability and experience, to prosecute the suits he brought for a remuneration considerably less than that he has paid; and if suits are unadvisedly brought, as we think was the case of "*Porche, curator, v. Connelly*," the estate ought not to suffer loss by it. "It is," as this Court has had occasion more than once before to remark, "a matter of great delicacy to determine the compensation due for professional services." But where estates are concerned, "we cannot be too rigid in adhering to the rule, that the fee must be graduated by the value of the services rendered." Such was the language of this Court in the case of *Stein v. Bowman*, 9 Lou'a, 284, and *Macarty's Succession*, 8 Ann., 517. Adhering to these views, we are of opinion from the evidence that \$1900 would be sufficient remuneration for the services rendered by *J. L. Cole*, and \$600 for those rendered by *W. Hall*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be reversed so far as it decrees that *J. L. Cole* should receive \$2940 for legal services rendered the estate, and so far as it confirms the payment already made to him of \$2650, and the payment made to *Winchester Hall* of \$1950; and, for the reasons already adduced, it is ordered adjudged and decreed, that the curator, *E. Porche*, shall only be entitled to a credit on his account of \$1900 paid *J. L. Cole*, and \$600 paid to *Winchester Hall*, and that the judgment in favor of the Heirs of *William Banks* be so amended that the net assets of the estate be divided amongst them shall be \$39,280 52, instead of \$36,890 52, as rendered. And that in all other respects the judgment of the District Court be affirmed—the costs in both Courts to be paid by the estate.

JOSEPH ADRIEN LEBLANC v. MICHAEL WALSH.

A judgment was obtained by *Walsh* against *Leblanc* for the price of a slave—conditioned that no execution should issue until *Walsh* had furnished personal or mortgage security to protect *Leblanc* from disturbance, or eviction. *Walsh* executed a mortgage, and sent a sheriff with a copy of the mortgage and a *fi. fa.* to *Leblanc*. *Leblanc* enjoined the writ—and the main ground was that no formal notice of the mortgage had been given before the writ issued. *Held*: the mere issuing of the writ worked no injury to *Leblanc*. Before any attempt was made to execute it, he had notice of the execution of the mortgage, and refused to accept it, not on the ground of an informal tender, but that the mortgaged property was insufficient. It seems inequitable to allow the plaintiff to enjoin upon this mere objection of form, which he did not make at the time. He might, it is true, have reasonably objected to pay the costs of issuing the *fi. fa.*—but ought to have been satisfied with the mortgage, and paid the debt.

A PPEAL from the District Court, Fifth District, Parish of Terrebonne. *Randall, J. Mercer*, for plaintiff and appellant. *Hall*, for defendant.

SLIDELL, J. This is a case of injunction, by which the execution of a judgment was restrained.

Walsh obtained a judgment against *Leblanc* for the price of a slave sold by *Walsh*, but with a condition in the judgment that no execution should be issued until *Walsh* had furnished personal or mortgage security, in the sum of eight hundred dollars, to protect his vendee from disturbance, or eviction.

Walsh then executed a mortgage of certain land by notarial act in favor of *Leblanc*, took out a *fi. fa.*, and sent the sheriff with the writ and a copy of the act of mortgage to *Leblanc*. He refused to accept the mortgage, on the ground that the mortgaged property was not worth eight hundred dollars. That such was the ground of refusal appears by his own acknowledgment in his petition for injunction.

From the evidence in this case it appears that the property mortgaged is worth eight hundred dollars. The ground, therefore, upon which *Leblanc* refused to receive it, was untenable.

But another ground was presented in his petition for injunction which succeeded in the Court below, and that was that a formal tender of the mortgage had not been made before issuing the *fi. fa.*

The mere issuing of the writ worked no injury to *Leblanc*. Before any attempt to execute it he had notice of the execution of the mortgage, and refused to accept it, not on the ground of an informal tender, but that the mortgaged property was insufficient. It seems to us inequitable to allow the plaintiff to enjoin upon this mere objection of form, which he did not make at the time. He might, it is true, have reasonably objected to pay the costs of issuing the *fi. fa.*, a very small matter, but ought to have been satisfied with the mortgage, and paid the debt.

Being of opinion that the plaintiff has resorted to the remedy of injunction without a substantial equity,

It is, therefore, decreed that the judgment be reversed, that the said *Walsh* have leave to proceed in the execution of his judgment, that the mortgage in the petition referred to stand as the security of the said *Leblanc*, for the purposes contemplated in the judgment of the District Court in the suit of *Walsh v. Leblanc*; that the costs of this suit in both Courts be paid by the said *Leblanc*, and that the said *Michael Walsh* recover as damages from said *J. A. Leblanc* and *Adolphe Verret*, his surety on the injunction, *in solido*, the sum of thirty dollars.

J. P. WATSON v. A. LEDOUX et al.

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A front proprietor on the river cannot be held bound to make reparation for the consequences of an accident, unless he was in fault when it occurred.

The Act of 1829, relative to Roads and Levees, so far as the Parish of Pointe Coupée is concerned, was repealed by the Act of 8th February, 1831.

In cases of flood, as in those of conflagration, the rule is, that services rendered voluntarily to preserve another man's property from destruction, are presumed to be gratuitous.

APPEAL from the Second District Court of New Orleans, *Lea, J. Durant* and *Hornor*, for plaintiff and appellant. *Elmore & King*, for defendants.

Plaintiff's counsel contended that as the work was necessary and useful to defendants, they were entitled to recover, and cited: Code, 2278; *O'Reilly v. McLeod*, 2 A., 147; *Police Jury v. Hampton*, 5 N. S., 389.

Defendants' counsel cited: *McWilliams v. Hagan*, 4 Rob., 375; *Bartholomew v. Jackson*, 20 Johns., 28; *Rennselaer Glass Factory v. Reid*, 5 Cowen, 587, 603, 620; *Munford v. Brown*, 6 Cowen, 475.

Rost, J. This case was remanded by us with directions to the District Judge to overrule the exception taken by the defendant, that the petition discloses no cause of action, and to proceed on the trial of the case.

An answer has since been filed and upon a trial on the merits, judgment has been rendered against the plaintiff, who prosecutes this appeal.

The District Judge has correctly interpreted the former opinion of the Court. We remanded the case because we thought that under the allegations of the petition evidence might be introduced under which the defendant would be liable, but we never meant to say that a front proprietor on the river is liable absolutely in all cases for the entire cost of stopping a crevasse upon his land. There is no law to make him so, and on principle, he cannot be held bound to make reparation for the consequences of an accident, unless he was in fault when it occurred.

The Act of 1829, relative to roads and levees, established a partial liability in such cases, and made the owner responsible for the labor furnished on the requisition of the levee inspectors to work upon crevasses, but that Act was repealed for the Parish of Pointe Coupee by the Act of the 8th February, 1831, and the power to legislate upon the subject of levees delegated to the Police Jury of that parish.

The Police Jury have exercised that power, and the ordinance adopted by them provides that planters furnishing hands to work upon crevasses, shall be entitled to no compensation therefor. The case of *O'Reilly v. McLeod* occurred on Bayou Lafourche, where the Act of 1829 is still in force; besides the defendant in that case was in fault. In the case of the *Police Jury v. Hampton* also, the defendant was in fault. See 2d Ann., p. 146; 5 N. S., 389.

The evidence shows that the levee of the defendants was in a good state of repair and no fault can be imputed to them. The accident was the result of *force majeure* exclusively, and in cases of flood, as in those of conflagration, we take the rule to be, that services rendered voluntarily to preserve another man's property from destruction, are presumed to be gratuitous and give no cause of action.

We do not think there is in the record sufficient evidence of an obligation on the part of the defendants to pay the sum claimed. The judgment must, therefore, be affirmed.

Judgment affirmed with costs.

PARISH OF WEST BATON ROUGE *v.* WM. B. ROBERTSON.

Constitutionality of a fine imposed by the Police Jury of West Baton Rouge affirmed.

The Supreme Court is without jurisdiction to decide an exception taken to the trial of a cause before a Justice of the Peace on the ground that the Justice was interested in the cause.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge, *Burk, J. Lobdell*, for plaintiff *H. M. Furot* and *A. S. Herron*, for defendant and appellant.

ROSE, J. This is an appeal by the plaintiffs from a judgment of the District Court reversing the judgment of a Justice of the Peace, by which the defendant was condemned to pay a fine of \$100, and dismissing the plaintiffs' claim, on some of the exceptions taken by the defendant to the action.

The action was brought under the provisions of an ordinance of the Police Jury, passed under the authority of an Act of the Legislature, delegating to that body the power to pass all such ordinances as they may deem necessary relative to roads and levees, and to impose such fines and penalties to enforce the same, as they may judge proper and expedient. Acts of 1831, B. & C., page 763, No. 129.

The only question into which we can enquire is that of the constitutionality or legality of the fine imposed by that ordinance. The District Judge, so far as we understand him, was of opinion that the ordinance was illegal because it made the fine collectable by information or indictment. We see no such disposition in the ordinance, and if there was, Justices of the Peace derive their jurisdiction from the law, and the Police Jury can neither increase or diminish it.

There was nothing illegal or unconstitutional in the fine imposed, and this exception should have been overruled; but leaving that exception out of view, there was another based upon the personal interest of the justice of the peace, which was also sustained by the District Judge. Of this exception we have no appellate jurisdiction, and as it is sufficient to sustain the judgment, the appeal must be dismissed.

It is ordered that the appeal be dismissed with costs.

N. KING KNOX *v.* JOHN BUHLER.

Notarial Certificate of notice of nonpayment, put in the Post Office at Baton Rouge, was headed as follows: "Baton Rouge, May 19, 1852. *Mr. John Buhler*—Parish of West Baton Rouge—Lobdell's Store Post Office, La." It was objected that this was no proof that the letter to *Buhler*, on the outside, was directed to any place. *Held*: that the Certificate was sufficient.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge. *Robertson, J. J. M. & J. E. Elam*, for plaintiff. *Seymour*, for defendant and appellant.

SLIDELL, J. The defendant is sued as endorser of a promissory note. There was judgment against him in the Court below. The only ground for reversal argued here is the alleged insufficiency of the notarial certificate of notice of protest.

SUPREME COURT OF LOUISIANA,

KNOX
v.
BUHLER.

The only evidence offered to prove notice was a certified copy of the certificate of the Parish Recorder (ex-officio a notary) in these words:

BATON ROUGE, May 19th, 1852.

MR. JOHN BUHLER,

Parish of West Baton Rouge,

Lobdell's Store Post Office, La.

MR. JOHN BUHLER, Parish of East Baton Rouge,

Baton Rouge Post Office, La.

MR. N. KING KNOX, Baton Rouge, La.

SIR.

Please to take notice that a Promissory Note, drawn by Thos. Devall, for \$1910 89, dated the 29th day of May, 1850, and due this day, has been duly protested by me for non-payment, and that the holder looks to you for payment as endorser thereof.

Respectfully, your obt. servant,

[Signed.] SAM. SKOLFIELD, Recorder.

I hereby certify, that on this nineteenth day of May, eighteen hundred and fifty-two, I served three original notices, whereof the above is a true copy, by depositing two for *John Buhler*, first endorser, in the Post Office at this place, and by delivering one for *N. King Knox*, second endorser, to him in person, and of which I made this record in presence of *J. Larquier* and *Joseph Nephter*, witnesses, at Baton Rouge, on the day and year above written.

J. LARQUIER.

[Signed.] SAM. SKOLFIELD, Recorder.

JOS. NEPHTER.

I certify the within to be a true copy of the original notices of protest and manner of the service.

Given under my hand and Seal of Office, at Baton Rouge, this 16th day of June, 1852.

[Signed.] SAM. SKOLFIELD, Recorder.

[Seal.]

It is admitted that Lobdell's Store Post Office, in the Parish of West Baton Rouge, was the proper post office to which to address by mail a letter to *Buhler*; but it is argued that the certificate is defective in this respect, "that the certificate of the notary does not state that the notices of protest were directed to him at that or any other place." The address stated in the certificate, it is said, is the mere inside address of the letter, and it does not appear from the certificate that such an address was on the outside of the letter which the notary put into the Post-office.

It is obvious from his decree that the District Judge thought the certificate imported a declaration by the notary that one of the letters put into the post-office was externally addressed to "*Mr. John Buhler*, Parish of West Baton Rouge, Lobdell's Store Post Office, La.:" and we are not prepared to say the District Judge erred in considering this the reasonable and fair intendment of the certificate, taken as a whole. The notary, after copying the letters so addressed, says, he deposited the two letters for *Buhler* in the post-office of the place of protest. Taking this expression in its popular sense, and reading it in connection with the rest of the certificate, we may fairly understand the notary as saying that he put them in the post-office addressed as in the heading of the letters. To suppose that the notary put them in the post-office without any address, is to suppose him to have first committed a gross omission of duty in a business he was employed to perform, and then to have disingenuously put his name to a certificate which would suggest to an ordinary mind a state of facts different from what really existed. We take it to be a just rule of interpretation, in a matter of this sort, that where the instrument is susceptible of two

constructions, one consistent with official duty and a reasonable and business-like purpose, and the other involving a gross omission of duty under circumstances clearly showing that such omission was not attributable to a lack of information on the part of the public officer as to the proper mode of accomplishing the purpose for which he was employed, the former interpretation should be adopted.

Judgment affirmed with costs.

KNOX
v.
BUEHLER.

ZOZINE AUDIGE, f. w. c. v. MANON GAILLARD, f. m. c.

Plaintiff, for months, left a loaded gun, resembling a walking cane, in her yard. It was taken up by a boy, about fourteen years old, belonging to defendant—in whose hands it went off and killed the plaintiff's slave. Plaintiff sued for damages. *Held*: It was the plaintiff's negligence which was the occasion of the accident, and this is sufficient to prevent her recovery.

APPEAL from the Second District Court of New Orleans, *Lea, J. Le Gard-ner*, for plaintiff and appellant. *Dufour*, for defendant.

Rost, J. We do not consider this a proper case for the allowance of the damages claimed. The servant of the defendant, a boy about fourteen years old, had gone into the yard of the plaintiff, at the request of the plaintiff's servant, and picked up from the ground where it lay, what to all appearance seemed a walking cane, and in handling it, as a boy of his age would naturally do, it went off and killed the plaintiff's slave. If there was any fault in the boy, there was greater fault in the plaintiff's leaving a disguised and loaded gun in her yard for months, as it is shown she has done. It was her negligence which was the occasion of the accident, and this is sufficient to prevent her recovery.

The testimony leaves it doubtful whether the cane was an air gun or a fire arm; if, as argued for the plaintiff, the fact of its being a fire arm was material to her, she should have shown it affirmatively.

Judgment affirmed with costs.

EVARISTE BLANC v. T. COUSIN.

When, by the act of the defendant and the acquiescence of the plaintiff, an action of boundary is changed into a petitory action—the defendant in the original suit becomes the plaintiff in the petitory action.

An appeal will not be entertained, in a case where there are warrantors, unless the warrantors, are made parties in the appellate Court.

APPEAL from the District Court, Eighth District, Parish of St. Tammany, *Baylie, J. Alfred Hennen*, for plaintiff. *Jones*, for defendant and appellant.

Rost, J. The plaintiff originally instituted an action of boundary against the defendant, who reconvened, alleging that he was the owner of the land which the plaintiff represented as belonging to him, and praying that he might be quieted in his possession and title, and also for damages. The plaintiff an-

BLANC
v.
COURTIN.

swered the demand in reconvention, joined issue on the question of title and called his immediate vendor in warranty. To this call in warranty no objection was made by the defendant, and the previous vendors were successively called in to defend the suit. Some of the warrantors answered to the merits and others filed exceptions. The question of title was tried by the District Court and decided in favor of the plaintiff. The defendant obtained an order of appeal in open Court and gave bond to the plaintiff alone, without mentioning the warrantors, or other parties in interest, either expressly or in general terms. The appellee has moved to dismiss the appeal, on the ground that the warrantors have not been made parties.

It is unquestionable that when by the act of the defendant, and the acquiescence of the plaintiff, the action was changed from an action of boundary to a petitory action, the defendant became plaintiff, as would have been the case if the original suit had been one for slander of title.

The original plaintiff having become the defendant, enjoyed all the privileges of defendants, and among others that of citing his vendors in warranty either to join in the defence, or to assume it at their exclusive expense. The case is therefore to be viewed as a petitory action instituted by the defendant.

The question presented by the motion to dismiss first came before the Supreme Court in the case of *Guerin et al, v. Bagnacres*, 9 L. R., 478. The Court then decided that warrantors have a direct interest to prevent the reversal of a judgment in favor of the party calling them in, and that the appellant was bound to bring them into Court, but the case being a new one, the Court granted time to cite the warrantor.

The same question came again before the Court, two years after, in the case of *Cuny v. Robert et al*, 12 L. R., 475; and the appeal was dismissed. Judge Martin, who was the organ of the Court, said: "In the case of *Guerin* we refused the dismissal and gave time to cite the warrantor, because the question was new and the members of the bar entertained different opinions in relation to it. As that decision has been long published and is well known, we do not think ourselves authorized to grant the same indulgence."

This decision was reaffirmed in the case of *Oliver v. Williams*, 12 R. R., 188, and it has been held, again and again, that an appeal will not be entertained unless all the parties having an interest in the maintenance of the judgment appealed from are made parties in the appellate Court.

The same question came before us lately in the case of *Charlotte Williams and husband v. Courtney et als*, and although the case appeared to us a hard one, we did not feel ourselves at liberty to change the settled jurisprudence of the Court, in a matter of practice.

That jurisprudence does not rest upon a mere technical ground. Its object is to speed the administration of justice, prevent a multiplicity of appeals, and secure the rights of the warrantors under all contingencies.

We are of opinion that the appeal be dismissed.

It is ordered that the appeal be dismissed with costs.

GOVY HOOD v. WM. L. KNOX, Sheriff et al.

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No amendments can be made to the judgments of the District Courts, if the appellee does not ask for them in the manner required by the Code of Practice.

A judgment cannot be amended in favor of the appellee, and damages, at the same time, allowed him for a frivolous appeal.

When the judgment enjoins bears ten per cent. interest, no more interest can be allowed on the dissolution of the injunction.

APPEAL from the District Court, Tenth District, Parish of Carroll. *Selby*, for plaintiff and appellant. *Caldwell*, for defendants.

DUNBAR, J. In this case the District Judge dissolved the injunction with ten per cent. per annum interest on the amount of the judgment enjoined, from the 3d June, 1852, until paid, and the plaintiff has appealed.

The defendants have filed no answer to the appeal stating the points on which they think they have sustained wrong, and praying that the judgment be reversed with respect to them, and confirmed with costs on the rest, but have contented themselves with a statement of these points in the Brief of their attorney, with a prayer for amendment and an affirmance of the judgment of the District Court, with damages for a frivolous appeal and ten per cent. special damages for Counsel fees.

We cannot make these amendments to the judgment of the District Court, because the appellees have not asked for them by an answer filed in conformity to the provisions of the Code of Practice, Art. 888, 907; 4 An'l, 150; 5 An'l, 146. Nor could we amend the judgment in favor of the appellee, and at the same time award him damages for a frivolous appeal. *Desblieux v. Darbonneau*, 2 Martin, N. S., 217.

We are satisfied from the evidence that the District Judge did not err in dissolving the injunction, but he should not have given any interest, as the judgment enjoined bore ten per cent. interest, and no other interest can be allowed on the dissolution of the injunction, *Erwin v. Bank of Kentucky*, 5 Annual, p. 5. However, as we believe that substantial justice has been done, and the interest allowed will not exceed or even equal the damages which should have been given, we are not disposed to make any change in the judgment of the District Judge, which is affirmed with costs in both Courts.

J. ROBATHAM, Tutor et al, v. FRANÇOIS AMEDE TETE.

Since the adoption of the Code of Practice, a judgment against the original debtor is no longer necessary to support an action of mortgage, even when the *via executiva* is resorted to. The only requisite in such case is an amicable demand from the debtor, or his heirs, thirty days before filing the petition.

APPEAL from the District Court, Fifth District, Parish of Assumption. *Mailhot and Mills*, for plaintiffs and appellants. *J. C. & A. Beatty*, for defendants.

ROBATHAM
v.
TATE.

Rost, J. The plaintiffs proceeded by the *via ordinaria* against the defendant, as third possessor of certain slaves formerly owned by the late Sarah Tong, their mother and tutrix, to subject them to their legal mortgage.

The defendant excepted to the petition on the ground that it does not clearly set forth the amount of the respective claims of the parties, and on the further ground that the plaintiffs have accepted the succession of their mother under benefit of an inventory, and can only maintain their action after the final settlement of her succession.

No action was had upon these exceptions, but the plaintiffs amended their petition, setting forth their claims with more precision, and the defendant then pleaded the general issue, and further that a tract of land belonging to Sarah Tong was sold at the probate sale of her succession, and that the plaintiffs cannot recover till they discuss the proceeds of the sale, or *credit them on their claim*. One of the exceptions was obviated by the amended petition, and the other must be considered as waived by the pleas to the merits. Those pleas, therefore, are alone to be considered.

The general denial having put at issue the reality and amount of the plaintiffs' claims, they adduced, to establish them, evidence which was received without objection, and which stands unimpeached. We think it makes out a *prima facie* case in their favor.

The District Judge dismissed the petition on the ground that there should have been a judgment against the tutrix before the action could be maintained. This objection was not raised by the defendant, and is, besides, untenable. Since the adoption of the Code of Practice, a judgment against the original debtor is no longer necessary to support an action of mortgage, even when the *via executiva* is resorted to. The only requisite in such cases is an amicable demand from the debtor, or his heirs, thirty days before the filing of the petition. C. P., 69. The plaintiffs themselves are the beneficiary heirs of Sarah Tong and cannot be required to make a demand from themselves. It is in proof that Sarah Tong died insolvent; that her property was sold, and that after paying the privileged debts, there remains only a balance of \$800 to be applied to the plaintiffs' claim. A demand from the administrator beyond that amount would have been useless, and the defendant does not insist upon it. He only asks that the balance, after payment of the privileges, be credited upon the plaintiffs' claim. We are of opinion that he is entitled to relief to that extent.

It is, therefore, ordered that the judgment of the District Court be reversed.

It is further ordered that the plaintiffs do have judgment in their favor, and that the defendant pay to them the sum of two thousand and eighty-four dollars, ninety-three cents, with legal interest from 1st April, 1853, till paid, or that he surrender the slaves Louise, Adelle and Negrillon, described in the petition, to be sold under the legal mortgage existing in favor of the plaintiffs, to pay said sum and interest. The defendant to pay the costs in both Courts.

JACQUES GOSSEKAND v. JEAN B. LACOUR et al.

Parole evidence is inadmissible to shew the declarations of a surety, made at the time of his signing the note, but out of the presence of his co-surety—the object of which evidence was to show what the surety supposed was the nature of his obligation.

A surety has a right to be subrogated to the principal's rights against his solidary co-surety, to the extent of the co-surety's liability; and if the principal grants time to the co-surety, that would defeat the surety's right to the subrogation—the surety is discharged.

APPEAL from the District Court, Ninth District. *Farrar, J.*
A Suit on the following promissory note.

\$3,543.

POINTE COUPEE, ce 20 Juin, 1849.

Dans tout Mars, mille huit cent cinquante, nous Jean B'te Lacour comme principal, et Madame V. Pierre Gondran, et Monsieur Jean B'te Decuir comme la caution, promettons de payer solidairement et l'un pour l'autre, à l'ordre de Monsieur Jacques Gosserand, la somme de trois mille cinq cent quarante-trois piastres pour valeur recue, avec interet à huit pour cent l'an depuis l'échéance jusqu'à parfait paiement.

[Signed] JEAN B. LACOUR,
JEAN B. DECUIR,
V. P. GONDRAN.

CHAS. HAGAN, témoin.

The following is the substance of a Bill of Exceptions taken by one of the defendants.

"Be it known that on the trial of this case, *Marguerite Decuir, &c.*, offered a witness to prove that the principal on the note, *Jean B'te Lacour*, went to ask from *Jean B'te Decuir* to sign the note as the surety of *Mad. Gondran*; that the said *Decuir* stated that he would sign it, not as *Lacour's* security, but as that of *Mad. Gondran, &c. &c.* The object of *Mad. Decuir* being by that evidence to prove the intentions of her father, and the obligation he assumed when he signed the note.

"It was not pretended that the note was signed in blank, and afterwards filled up. Thus the testimony offered went to contradict by parol the written obligation itself, and the object of the evidence being to bind the defendant, *Gondran*, as principal in a written obligation in which she appeared to be a surety, by proving a verbal statement made by the other surety out of her presence, the Court considered the evidence illegal and rejected it accordingly."

Mahodeau, for plaintiff. *Provosty* for *Lejeune*, and *Cooley* for *Gondran*, defendants.

Provosty cited 2 R., 380; 5 A., 508; 11 R., 28; 5 A., 12; *Saulet v. Te-paguler*, 2 A., 429; *Troplong, Cautionnement*, Nos. 553, 556.

SLIDELL, J. On the face of the note we consider *Madame Gondran* and *J. B. Decuir* bound as sureties *in solido*.

We are of opinion that the District Judge did not err in excluding parole evidence of the declarations of *Decuir*, made at the time of his signing the note, but out of the presence of *Madame Gondran*, as to what he supposed was the nature of his obligation.

It is undisputed that *Gosserand*, the holder of the note, gave time to *Madame Gondran*; and the question arises whether this agreement affected, and if so, to what extent, the liability of her co-surety *Decuir*, and his heir *Mrs. Lejeune*.

By the Article 8082 of the Code of 1825, it is said, the prolongation of the term granted to the principal debtor, without the consent of the surety, operates a discharge of the latter.

It is argued for the plaintiff that this article does not in terms cover the case of time given to a co-surety. This is true. But we consider its spirit applica-

GOSSERAND
v.
LACOUR.

ble to the present question, especially when we revert to the pre-existing law, and the reasons suggested by the jurisconsults who prepared the amended Code, which is the law of this contract.

In the Code of 1808, under the head "Extinctions of Suretyship," is the following Article. "The simple prorogation of the term granted by the creditor to the principal debtor, does not exonerate the surety, who may in this case sue the said debtor, to compel him to make payment."

In presenting the amendment which was adopted by Article 8082, above cited, the jurisconsults submitted to the legislature the following remarks.

"This is an innovation on the principles acknowledged by authors, and an entire change of the provision as it existed before, in which it is declared that a mere prorogation of the term granted to the debtor should not discharge the surety. It is proper, therefore, that we should state the reasons which have induced us to propose this amendment.

"*Pothier*, from whom principally the French Code has adopted a provision similar to that which we propose to abolish, gives as a reason for his opinion, that where the creditor accords the debtor a prorogation of the time, this does not prevent the surety from acting against the debtor, and providing for his indemnity, if he perceives that the fortune of the debtor is beginning to diminish.

"Notwithstanding the respect due to an authority of such weight, we do not think that this doctrine is in accordance with general principles, as applicable to matters of suretyship, nor that it is just to drive the surety to this recourse. The obligation which the surety contracts is to pay at the time fixed by the contract, if the debtor himself does not. This security is given for a limited time. When the time of performing the obligation arrives, the surety should have the right of insisting on the execution of the contract, that he may be discharged, or at least that he may be informed of the amount which he has to pay. To prolong his obligation beyond the term fixed, is to force him beyond his undertaking; to subject him to conditions to which he did not mean to submit. In fine, *it is changing his contract.*" See Amendments, p. 119.

If we apply the spirit of these remarks and of the amendment to the case before us, how does the matter stand?

Mrs. Decuir had a right, as surety, to be subrogated to the rights of the plaintiff, under the original contract, against her co-surety to the extent of their share of liability, which *inter se* her co-surety was bound to have. For being bound as sureties *in solido*, either, on paying the whole debt had a right to resort to the co-surety to reimburse one half. But if the appellant had paid the plaintiff the whole claim, and demanded a subrogation of the rights of the plaintiff against *Madame Gondran*, the plaintiff could not have given it. By his agreement he was estopped from present suit. Thus the co-surety's right under the contract had been changed, to the co-surety's detriment, by the act of the creditors; and therefore, in our opinion, the co-surety's liability was *pro tanto* discharged.

We are of opinion, therefore, that the judgment against the appellant for the whole amount of the note and interest, was erroneous, and that the judgment should be reduced by one-half, being the amount of the share of the co-surety, *Mrs. Gondran*.

It is, therefore, decreed that the judgment of the Court below against *Mrs. Margaret Decuir*, wife of *Ovid Lejeune*, be reversed, and that the said plaintiff recover of the said *Margaret Decuir* the sum of \$1771 50, with interest there-

on from the 3d April, 1850, until paid, at the rate of eight per cent. per annum and costs of the suit against her in the Court below, the costs of the appeal to be paid by the plaintiff.

GOSBERAND
v.
LACOUR.

E. A. BENNETT, Tutrix, v. STARNES, Sheriff and another.

Where the Sheriff levies property in the possession of the judgment debtor, the party representing himself as the owner, who sues for damages for an illegal seizure, must make out his title fully and clearly before the Sheriff can be mulcted. The duties of the Sheriff are delicate and his responsibilities great, and unless Courts of justice are cautious in entertaining claims for damages against him, the efficiency of the law may be impaired.

A PPEAL from the District Court, Eighth District, Penn. J. *Watterson*, for plaintiff. *J. R. Jones*, for defendant (*Starnes*) and appellant.

DUNBAR, J. Under an execution issued on a judgment obtained by the defendant *Stiles* against *Eliza Anne Bennett*, the Sheriff seized certain slaves, which he found in her possession. Shortly afterwards the present suit was instituted by *Mrs. Bennett*, as tutrix of her daughter by a former marriage, *Octavine Williamson*, averring that the title to the slaves seized was in her said daughter, and praying that the seizure be set aside, and that the defendants *in solido* be adjudged to pay her, for the use of her daughter, five hundred dollars damages and hire for the negroes during their detention. It appears from the Sheriff's return that the slaves were restored to the plaintiff not long after their seizure, so that the suit resolved itself simply into an action for damages. The Court below gave judgment against the defendants for, *in solido*, the sum of two hundred dollars, from which *Starnes*, the Sheriff, has appealed. The other defendant is not before us. We have carefully examined the evidence adduced on the trial, and are by no means satisfied that the title of the plaintiff, *Octavine Williamson* has been established so fully and clearly as to authorize us to mulct the Sheriff in damages for their seizure. The general principle is true, that the Sheriff who wrongfully seizes the property of another is a trespasser, and according to the circumstances of the case, is liable in damages as such, but he who sets up title as owner, ought to establish it clearly and satisfactorily.

We are not to be understood as deciding, in the present case, that *Octavine Williamson* is not the owner of the slaves which were seized, but that the evidence offered on her behalf is masked by circumstances which raise serious doubts in our minds. The duties imposed by law upon a Sheriff, armed with a writ of execution, are frequently of a very delicate nature, and his responsibilities great. Unless, therefore, it is made manifest that he has exceeded his powers, and stepped beyond the line of duty, Courts of justice may well be cautious in entertaining claims for damages against him, or the efficiency of the law will be arrested; particularly in cases where the debtor is in open and notorious possession and enjoyment of property, the paper title to which may be in another.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower Court, so far as it regards the Sheriff, *B. B. Starnes*, be reversed and set aside, and judgment is rendered in his favor, the plaintiff and appellee paying costs in both Courts.

H. F. BENNET *v.* B. B. STARNES, Sheriff.[Same principle as *E. A. Bennet, Tutrix, v. Sams*.]

A PPEAL from District Court, Eighth District, *Penn, J. Watterson*, for plaintiff. *Jones*, for defendant.

DUNBAR, J. This case does not materially differ from that just decided of *E. A. Bennet, tutrix, v. the same defendants*. The plaintiff, who is the husband of *Eliza Ann Bennet*, the original defendant in execution, sets up title and claims as his own, three of the slaves seized by the Sheriff, and prays damages against the defendant *in solido* for their illegal seizure. There was judgment in his favor for one hundred and fifty dollars, and the defendant, *Starnes*, has appealed. We do not consider that the plaintiff has established such a title as would authorize us to affirm the judgment of the Court below, and the opinion just expressed in the case of *E. A. Bennet, tutrix*, as regards the liability of Sheriffs, we reiterate here.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower Court, so far as it regards the defendant, *B. B. Starnes*, Sheriff, be reversed and set aside, and judgment is rendered in his favor, the plaintiff, appellee, paying costs in both Courts.

PETER O'NEAL, Adm., *v.* JANE OATES.

An administrator has no right to claim from an heir the delivery and possession of property of which the heir became an undivided proprietor with his co-heirs on the death of the common ancestor; without suggestion, or proof that such property is necessary for the payment of the debts of the succession.

A PPEAL from the District Court, Sixth District, *Robertson, J. Herron and Gil*, for plaintiff and appellant. *Dunn*, for defendant.

DUNBAR, J. This is an action instituted by *Peter O'Neal*, as administrator of the succession of *Nancy Oates*, to recover from the defendant a negro woman and child, which he avers to be the property of the estate, and hire for their detention. The defendant pleads that she holds possession of these slaves as tutrix of her minor son, *William Thomas Oates*, issue of her marriage with *Henry Oates*, who was the son of *Nancy*. That the said *Nancy* had in her life time divided her negroes amongst her children, and that to her son *Henry* she gave the slaves in controversy by way of advancement. She specially denies the right of the administrator to take this property out of her possession. That there are no debts to be paid; that if there are, she is ready, on behalf of her child, to give security therefor, and that the heirs of *Nancy Oates* alone, by an action of Partition, have any right to call in question her child's title to the property. There was judgment in her favor, and the administrator has appealed. The original ownership of the slaves by *Nancy Oates* is admitted, and the heirship of the minor child of the present defendant, by representation, is also conceded. No proof has been offered, nor indeed has any allegation been made that the succession of *Nancy Oates* is in debt. Under the circumstances the

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appointment of an administrator seems to have been unnecessary. Admitting, however, that it was, this Court held in the case of *Davis v. Davis*, 5th Annual, 561, that the administrator of an estate has no right to sue an heir upon a debt due by him to the estate, and compel him to bring the money into Court, where there is neither suggestion nor proof that it is necessary for the payment of the debts of the succession. So in like manner, neither has an administrator the right to sue the heir for the delivery and possession of property, of which he became an undivided proprietor with his co-heirs upon the death of the common ancestor. C. C., 1214. It is a question to be settled amongst the heirs themselves on a partition of the estate. From the evidence it would seem that *Nancy Oates* divided her negroes amongst her children in her lifetime, and that the present plaintiff, who was her son, received one. If there was any inequality it can be adjusted in the manner pointed out by law.

This view of the case renders it unnecessary for us to express any opinion on the Bill of Exceptions taken by plaintiff on the trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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STATE OF LOUISIANA *v.* HENRY A. RIDDING et al.

When the obligation of a bail bond is for the prisoner to appear and remain until discharged by due course of law, the sureties are bound, though the prisoner be indicted for an offence different from that for which he was committed.

A PPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Burke, J.* Jones*, for the sureties.

DUNBAR, J. This is an appeal from a judgment on a bail bond by the sureties of *Ridding*, who allege in their defence, that they cannot be held responsible for the appearance of their principal to answer a different and higher crime than the one recited in their bond.

It appears that *Ridding* was committed to jail, in the parish of East Baton Rouge, by a magistrate, for the crime of shooting one *Samuel Oldfield*, with intent to kill, and was admitted to bail by order of the District Judge.

The bond recites: "That whereas the above bounden *Henry A. Ridding* is in the custody of the Sheriff of the parish of East Baton Rouge, by virtue of a commitment issued by *John R. Dufroe*, justice of the peace, in and for said parish, on a charge of shooting one *Samuel Oldfield* with intent to kill, now on file, and to be brought before the Grand Jury of said parish, at the next Jury term of the Sixth District Court, to be holden in and for said parish. Now if the said *Henry A. Ridding* shall well and truly make his personal appearance, in the Sixth District Court for said parish, on the second Monday of October next, 1851, at the Court House of said parish, to answer to such matter and and things as shall then and there be objected or exhibited against him, the said *Henry A. Ridding*, and shall there continue and remain, from day to day, and from term to term, until he be discharged by due course of law, or surrender his body to the custody of said Court, then this obligation to be null and void, otherwise to remain in full force and virtue."

* After judgment was rendered on the bond, an unsuccessful attempt was made to annul the judgment, before *Robertson, J.*, who succeeded *Burke, J.*

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On the 17th October, 1851, at a session of the District Court, for the parish of East Baton Rouge, the Grand Jury found a true bill, on an indictment against *Ridding*, for shooting with intent to commit murder. Upon which day the said *Ridding* failing to appear, and his sureties also failing to produce him, on motion of the District Attorney, a judgment was entered up against him and his sureties, upon their bail bond.

It is clear to us that there has been a forfeiture of the bail bond.

"If the sureties are bound by recognizance that a defendant shall appear in the King's Bench, the first day of such a term, to answer to a particular information against him, and not to depart until he shall be discharged by the Court, and afterwards the Attorney General enters a *nolle prosequi*, as to that information, and exhibits another, on which the defendant is convicted, and refuses to appear in Court, after personal notice, the recognizance is forfeited by the default; for being express that the party shall not depart till he be discharged by the Court, it cannot be satisfied unless he be forthcoming, and ready to answer to any other information exhibited against him, before he receives his discharge, as much as that he was particularly bound to answer." 1st Chitty's Criminal Law, 105.

Here the obligation is the same—to appear and remain until the defendant be discharged by due course of law, or surrender his body to the custody of the Court.

The judgment of the District Court is, therefore, affirmed, with costs.

NEW ORLEANS and CARROLLTON RAILROAD COMPANY v. BOSWORTH, LILES et al.

The remedy of parties to a judgment alleging matters *in pais*, against one not a party to the record, is by an action in the ordinary form, and not by rule; therefore, proceedings against the heirs by a judgment creditor of their deceased father, to make them liable for their father's debts because they had taken possession of his succession, and made an informal distribution of it among themselves, must be by an ordinary action, and not by rule.

A judgment obtained against one who, though cited, dies before issue joined, is a nullity.

APPEAL from the District Court, Tenth District, Parish of Carroll. *Copley, J. Snyder*, for plaintiffs and appellants. *Selby*, for defendants.

Rost, J. The plaintiffs, having obtained a judgment against *Liles* in 1840, have taken a rule upon his heirs, who were all minors at the time of his death, to show cause why said judgment should not be made exigible against them, on the ground that they have rendered themselves liable for the debts of their father by taking possession of his succession, and making an informal distribution of it among themselves.

In that aspect of the case it would not materially differ in principle from that of *Reynolds et al. v. Horn et al.*, 4th Ann., 187, in which it was held that the remedy of parties to a judgment alleging matters *in pais*, against one not a party to the record, was by an action in the ordinary form, and not by rule. But there is, in fact, no judgment against *Liles* that can be made exigible against his heirs; he died after being cited, but before issue joined, and judgment was entered against him through error and in ignorance of his death. That judg-

ment is a nullity, and there is nothing for the rule to rest upon. It should, therefore, have been discharged, but the District Judge erred in rendering a final judgment for the defendants.

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ET AL.

It is, therefore, ordered that the judgment be reversed, and the rule taken by the plaintiffs discharged.

It is further ordered that the costs of the District Court be paid by the plaintiffs, and those of the appeal by the defendants.

BENJAMIN LEE v. WILLIAM WHITEHEAD.

Simulated sale annulled.

The prescription of one year, established against certain real contracts, does not apply to those that are simulated.

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APPEAL from the District Court, Fourth District, Parish of West Feliciana, *Perkins, J. Stockton and Steele*, for defendant.

Rost, J. The plaintiff has enjoined the sale of certain slaves, seized at the suit of the defendant against *Nicholas Barnes*, and claims title to them under judicial sales made in other suits against *Barnes*.

The defendant admits the existence of the title alleged, but avers that it is a simulation, devised by *Lee* and *Barnes* for the purpose of defeating the pursuit of the creditors of the latter, and that the name of *Lee* is merely used therein to cast a shadow upon the title of *Barnes*, which, in truth, has remained unchanged after the judicial sales. The District Court perpetuated the injunction, and the defendant has appealed.

Several questions have been raised in argument which it is not necessary to notice in detail. There is no legal evidence that the exception taken by the plaintiff, during the trial, was acted upon by the Court, or that he excepted to any of the testimony offered by the defendant in support of the issue of simulation, and it clearly results from the evidence which he himself introduced, and the admissions which he required the defendant to make, that the case was tried on that issue.

We deem it, also, unnecessary to take into consideration the informalities of the judicial sales, alleged as grounds of nullity by the defendant's counsel. He avers in his answer that the sales were made not only with the consent of *Barnes*, but by his procurement; they must, therefore, be considered as his acts, without regard to the form pursued and the informalities which, under a different state of facts, might perhaps affect their validity.

Under three executions issued in suits against *Barnes*, the slaves in controversy, with others, and a large body of land, partly in cultivation, were seized and adjudged by the Sheriff to the plaintiff for the sum of two thousand five hundred dollars, subject to the mortgages mentioned in the certificate of the Recorder, read at the sale, which amounted to upwards of sixty thousand dollars. Two days after the sale, which took place in the month of April, 1841, *Lee*, the purchaser, gave *Barnes* a power of Attorney to manage and administer the property sold. *Barnes* continued alone in possession until the fall of the year, when *Lee* came from the State of Mississippi with his family, and lived on

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the place during more than one year. Early in 1848 he gave another power of attorney to *Barnes*, authorizing him not only to administer, but also to sell and mortgage the property. He then returned to the State of Mississippi, and had never been seen on the place again until he made the affidavit on which the injunction in this case issued, in April, 1851.

The defendant admitted before the trial, for the purpose of avoiding a continuance, that if an absent witness for the plaintiff was present, he would testify that *Lee* took possession of all the property purchased by him, and remained in actual possession thereof for more than a year, when he left on account of ill-health and the dissatisfaction of his family, and that during the time he was on the place he exercised all the rights of ownership over the property, and no other person exercised any rights of ownership during that time.

Two other witnesses, relatives of *Lee* and *Barnes*, also testified to the residence of *Lee* upon the place during more than one year, and that he exercised the rights of ownership during that time. It is proved that at least six months elapsed after the sale, before *Lee* came to live upon the plantation, and that *Barnes* continued to reside there after he came. Admitting the statement that *Lee* exercised the rights of ownership while he remained, to be true, it is insufficient to do away the presumption of simulation, resulting from the facts that the seller remained alone in possession during the six months which followed the sale, and that he has had sole control of the property since the departure of *Lee*. That presumption rests on motives of morality and public policy, and after it once attaches, it cannot be removed by so easy an expedient as the temporary residence of the purchaser on the premises sold. The parties must, in all such cases, produce proof that they are acting in good faith, and establish affirmatively the reality of the sale. C. C. 2456 and 1915.

The Court is unanimously of opinion that the plaintiff has failed to make that proof, and that the judgment rendered in his favor is clearly contrary to evidence.

One of the facts admitted by the defendant to prevent a continuance, was that the absent witness of the plaintiff would, if present, testify that *Lee* had the means to pay the two thousand five hundred dollars, for which the property was adjudicated to him; but there is no proof that he made the payment out of those means, and it is shown on the other side that *Barnes* had at the time, in the hands of his factor in New Orleans, two thousand seven hundred dollars, of which no account is given. Suffering his lands and slaves to be sold when he had on hand a sum larger than the amount they brought, is a course of conduct so unusual and inexplicable, that we cannot bring our minds to believe that he would have resorted to it, if the sale had been intended to be serious. The only rational explanation of which it is susceptible is, that *Barnes*, finding himself hopelessly insolvent, attempted in that manner to defeat the claims of a portion of his creditors, by placing his property in the hands of a third person, who would hold it for his benefit, subject only to the mortgages anterior in date to those under which it was sold—presumptions of that kind are authorized in cases of insolvency.

It is urged that the mortgages to which the property was subject have since been paid by *Lee*; but there is no evidence that he had any means to pay them beyond the property which he purchased; and no inference favorable to the good faith and reality of the transaction can be drawn from the fact that this property and its fruits have been applied to the payment of the mortgages, while, on the other hand, the unquestionable fact that some of those mortgages

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have been satisfied out of other means of *Barnes*, satisfactorily shows that the release of those incumbrances were to inure to his benefit. What interest had he otherwise to apply his own means to pay mortgages for which the property sold was bound in the hands of the purchaser, and how could he do so, in good conscience, when those means were the common pledge of his unprotected creditors?

It has not escaped the attention of the Court that all those payments were made by *Barnes*, as agent of *Lee*, and while *Lee* resided in another State, at a distance of about two hundred miles. We must presume that he ordered them to be made, or was at least duly advised of them by his agent; but he has not seen fit to lay before us a line or a word of the correspondence which must necessarily have passed between them; if the sale was real.

In 1844, *Barnes*, pretending to act as agent, exchanged a tract of land for another belonging to *Mrs. Demos*, who agreed to pay him \$10,000, for the difference in value. *Barnes* not only acted without authority in making that exchange—the power of attorney only authorizing him to sell or mortgage—but he forgot on that occasion the limits of the paper title of his principal, and sold as agent lands which were his own, and to which *Lee* had no claim.

In 1845 he pointed out to the U. S. Marshal, as his own, part of the Bushy bayou plantation, purchased by *Lee*. The land was seized and sold to satisfy a judgment against *Barnes*.

In 1847 the Legislature granted to *Barnes*, the agent of *Lee*, the privilege of keeping a ferry, which he has kept ever since.

These acts of the agent were all of such a nature as to require explanation; the pointing out the property of his principal as his own, and causing it to be sold, was a fraud with which no owner of property would put up; yet so far as the record shows, *Lee* never complained, and his confidence in his unfaithful agent has remained unabated to this day.

There are other facts in the record leading to the same conclusion, but we have said enough to show that the plaintiff has failed to establish his good faith and the reality of the sale, as under the facts of the case he was bound to do. Having come to the conclusion that the title of *Barnes* was not divested by the Sheriff's sales, it is clear that prescription of one year cannot be invoked by the plaintiff. That prescription only applies to real contracts—this case is hardly distinguishable from that of *Erwin v. The Bank of Kentucky*, 5 Ann., page 1.

The judgment of the defendant against *Barnes* bearing interest at the rate of ten per cent. per annum, no further interest can be allowed on the dissolution of the injunction.

It is ordered that the judgment be reversed.

It is further ordered that the injunction be dissolved, and the defendant be allowed to proceed under his execution.

It is further ordered that the defendant recover from the plaintiff and *Richard Featherston*, his surety on the injunction bond, *in solido*, the sum of two hundred and fifty dollars damages.

It is further ordered that plaintiffs pay costs in both Courts.

CHARLES SIMON AND BROTHER *v.* WM. L. BURNETT.

When at the time of the institution of a suit to rescind the sale of a slave, the vendor resides in Baton Rouge, and the slave is in a dying condition in New Orleans, no tender need be made. It seems that when the vendor refuses peremptorily to rescind the sale of a slave, no legal tender is necessary.

APPEAL from the District Court, Sixth District, *Robertson, J. Brunot*, for plaintiffs and appellants. *A. M. Dunn* and *J. W. Seymour*, for defendant.

ROST, J. We are of opinion that the verdict and judgment, in this case, are contrary to evidence.

Samuel Weil, who took charge of the slave in controversy for the plaintiffs, on the day they purchased her from the defendant, has testified that, two days after the sale, she was sick and unable to work; and that, after a few days, he wrote to them that she was worth nothing, and that he would not have her as a gift. After ten or twelve days, her health not improving, she was sent to the plaintiffs, in this city, and placed by them under the care of a skillful physician, who attended her until she died. He has testified that the disease was of long standing; that it had assumed the chronic form, and become incurable when he first saw her, and that it progressed slowly, but surely, till the final termination by death, about five months after the sale. Another physician, who also attended the patient and was called in consultation, fully corroborated this testimony. A *post mortem* examination would, no doubt, have been more satisfactory than the conjectural opinions of physicians as to the nature and consequences of the disease; but those opinions, corroborated as they are by the testimony of *Weil*, are sufficient to make out a *prima facie* case in favor of the plaintiffs, and the testimony of the defendant is not inconsistent with the truth of the facts sworn to by the plaintiffs' witnesses. It has been urged in argument, that a tender of the slave had not been shown. At the time the suit was instituted, the slave was in a dying condition in this city, and could not be tendered to the defendant in Baton Rouge. One of the plaintiffs went there, and informed him of the situation of the slave, and asked him to rescind the sale, which he peremptorily refused to do. After that refusal, we are not prepared to say that a legal tender would have been necessary under any circumstances. *Cottle v. Wilson*, 1 Ann. p. 4; *Fuentes v. Caballero*, 1 Ann. p. 28; *Bowman v. Ware*, 18 L. R. 397. The disease is shown to have existed within the three days which followed the sale, and the presumption is that it existed before the sale; but as there is nothing to show that the defendant was apprised of its existence, he must be held to have acted in good faith.

The slave having rendered no service to the plaintiffs, the defendant, besides refunding the price of \$650, must re-imburse the expenses incurred during the prolonged illness of the slave, which we assess at \$100. The expenses occasioned by the sale are not shown.

It is ordered that the judgment in this case be reversed.

It is further ordered that the plaintiffs recover from the defendant seven hundred and fifty dollars.

It is further ordered that the defendant pay costs in both Courts.

CHARLES DEAN, adm. v. THOMAS H. WADE.

Letters of administration make full proof of the party's capacity until they are revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.

Note alleged to be given to plaintiff, as administrator, for the price of an improvement, or pre-emption on public land—and that plaintiff contracted to make defendant a title thereto. *Held*: Such a contract could only bind plaintiff personally.

A PPEAL from the District Court, Tenth District, Parish of Carroll, *Perkins, Jr., J. Drew & Bonner*, for plaintiff. *Selby*, for defendant and appellant.

DUNBAR, J. This suit is brought on a promissory note for fifteen hundred and ten dollars, drawn by the defendant, payable to the legal representatives of *Alfred Dean*, deceased.

To this action the defendant filed several exceptions, only one of which we consider it necessary to notice, in which he alleges that the plaintiff was appointed administrator by the clerk of the District Court of Carroll, out of Term time, after an opposition had been made to his appointment by *Henry A. Burt*, and, consequently, such an appointment conferred no power upon him.

By reference to the order making the appointment, we find it therein expressly stated, that the plaintiff, *Charles Dean*, was appointed after the lawful notice had been given, no opposition having been made, and his letters of administration are in the usual form. "Letters of administration make full proof of the party's capacity, until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued, cannot be examined collaterally." *Rile v. Viesti*, 2d Louisiana, 249; 2 Annual, 538; *Hogan*, Curator, v. *Thompson*.

The defendant, after his exceptions were overruled, pleaded a general denial, and further alleged that the note sued on was given in part for the purchase of an improvement, or pre-emption on public land, and that plaintiff, as administrator, entered into a written contract with the defendant to make him a title thereto, which he has failed to do. Admitting that the plaintiff, as administrator of *Alfred Dean*, made such a contract with the defendant, it could only bind him personally, and not as administrator; because, in that capacity, he had no right to make any such contract, and the defendant must look to him individually for its performance, or for damages for the breach of it.

This view of the case will render it unnecessary to notice the several bills of exception, taken by the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MARGARET E. WOODWARD v. A. LEDOUX & Co.

The purchaser of a tract of land cannot refuse to pay, on the ground that the vendor's title has not been confirmed by the United States.

The purchaser is not entitled to a diminution of the price where the deficiency in the land does not exceed one-twentieth of the tract sold.

A PPEAL from the District Court, Seventh District, *Stirling, J. Ratliff*, for plaintiff and appellant. Cited C. C. 2427; 9 Rob. 288; 10 Rob. 425; 5

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Rob., 193; 1 A., 284; 12 Rob., 626; 4 A., 458; *Noe v. Taylor*, 11 Rob., 556; *Toledano v. Desban*, 4 Rob., 830; 4 R., 315; 5 Rob., 75; 10 R., 5; 2 A., 135; 3 A., 192; 4 A., 109. *Brewer & Collins* and *U. B. & E. Phillips*, for defendant.

DUNBAR, J. The defendants sold a "tract of land, situate in the parish of West Feliciana, on the waters of Thompson's Creek, adjoining and bounded by lands of Cyrus Ratliff, Riddle and others, containing about seventeen hundred and twenty arpens, be the same more or less," to the plaintiff, for the sum of sixteen thousand dollars. A mortgage, to secure the payment of the price, was retained on the property, and the purchaser failing to pay the purchase money, as stipulated in the act of sale and mortgage, the vendors took out an order of seizure and sale, which was enjoined by the plaintiff in the present suit.

The District Judge sustained the injunction until the defendants should give security to indemnify the plaintiff against any damages she may suffer from being evicted from said land, or until defendants furnish her with a good and valid title, and upon defendants giving bond and security, as specified in the decree, it was ordered that the injunction be dissolved.

From this judgment the plaintiff has appealed.

The grounds of plaintiff, for resisting the payment of the purchase money, are,

First. That the vendors have no title out of the government of the United States, and, consequently, having no title, they cannot be permitted to give security and require payment, as the defect is incurable, and no lapse of time would cure the defect, as prescription does not run against the government of the United States.

Second. That the quantity of land is greatly deficient, and that other persons are in possession of a portion of said land and refuse to give it up.

Third. That there are judgments and mortgages, and suits brought, claiming a lien upon the land, which vendors are bound to remove, or quiet, before they can exact payment.

In support of the first ground of the defence, the plaintiff introduced the testimony of *Amos Kent*, Register of the United States, and *R. W. Boyd*, the United States Surveyor General for the State of Louisiana, who prove in substance, that they have been unable to find any confirmation by the United States Government of the land sold by the defendants to the plaintiff. This, however, is by no means conclusive as to the defectiveness of the title of defendants. Their title may have been complete under the French or Spanish government, and required no confirmation to give it validity under ours. If not complete and requiring confirmation, it does not follow that this confirmation will not be yet obtained. In the case of *Guidry v. Green*, 1st Martin, N. S., 475, it was held: "That the purchaser of a tract of land of 1400 arpents cannot refuse payment on the ground, that the United States have only confirmed the title to 640." In the case of *Bessy v. Pintado et als*, 8d La., 489, it was decided, "that the sale of land, under a Spanish grant, is not void, because the United States refused to confirm it, nor does that circumstance amount to an eviction." See also the case of *Pepper v. Dunlap*, just decided by this Court. We have, therefore, concluded that this defence is untenable.

The next ground of defence—that the land is deficient in quantity, and that persons are in possession of a portion of it and refuse to give it up—we consider equally untenable. The evidence shows that the plaintiff has, within the

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boundaries of the tract as possessed by her, 1653 arpents of the 1720 sold; and this deficiency would not entitle her to a diminution in price, as it does not exceed one-twentieth. Civil Code, Art. 2470.

The last objection of the plaintiff, of suits, liens and mortgages against the tract of land sold to her, has been removed by the judgment of the Court below, requiring the vendors to give security—which they allege they are willing to do. Civil Code, Art. 2535.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

BOARD OF SELECTMEN v. SPALDING & ROGERS.

The tax imposed by the town of Baton Rouge upon public exhibitions is a mere police regulation, necessary to the order and the very existence of towns and cities, and not restrained by any provision of the Constitution of the United States.

A PPEAL from the Mayor's Court, town of Baton Rouge, *J. R. Dufrooy*, Mayor.

Defendants were proprietors of a steamboat on which they had Circus exhibitions. They claimed the right to give these exhibitions without the usual town license, on the ground that they had taken out a coasting license, under the act of Congress.

Seymour, for plaintiffs. *Brunot*, for defendants and appellants.

Ross, J. We shall not attempt to decide whether Circus exhibitions are such a coasting trade as the license of the custom house could authorize the defendants to carry on, on board of the Floating Palace; for admitting that it can, and that the license is in proper form, the tax imposed by the town of Baton Rouge upon public exhibitions, is a mere police regulation, necessary to the order and the very existence of cities and towns, and neither surrendered nor restrained by any provision in the Constitution of the United States. The authority of the State, in such cases, is complete, and, as it has, in this instance, been delegated to the plaintiffs, they are entitled to recover.

Judgment affirmed, with costs.

E. M. PEACOCK, adm., v. THOS. CHAPMAN.

Surety discharged because of time granted to principal.

A PPEAL from the District Court, Seventh District, Parish of East Feliciana, *Stirling, J. Muse & Merrick*, for plaintiff and appellant. *Winter*, for defendant.

ECCLIS, C. J. The plaintiffs are appellants from a judgment rendered against them in a suit against the defendant as a surety of *William Sewell*.

On the 7th day of February, 1839, *Sewell* became the purchaser of certain slaves for the sum of \$2571, payable on a credit of one, two and three years,

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in equal instalments, bearing ten per cent. interest until final payment. It was agreed that the proces verbal of the sale should have the effect of a judgment and be recorded in the book of mortgages. The proces verbal, signed by *Sewell*, and *Chapman*, his surety, was so recorded. The sale was under the authority of the Court, directing the sale of the property of the succession of the late *Malachi Weston*.

The slaves were subsequently sold to *John P. Carney*, who assumed the payment of the purchase money, and made on account a partial payment.

The plaintiffs sued *Carney* and had judgment against him, by which the slaves were directed to be sold, so as to meet the last instalment of the price due on the 7th February, 1842. On the 7th June, 1842, the plaintiffs consented that the sale should be made on a credit of twelve months, and they were so sold, and *Carney* became the purchaser again, and gave the plaintiffs his twelve months bond.

By thus extending the term of credit on the sale of the property mortgaged to the plaintiffs, equally for the benefit of the surety as for their own, the plaintiffs could no longer give the defendant the subrogation which he had a right to exact on paying the debt. This act of the creditor released the surety. Code, 8080. *Loddell v. Nipbler*, 4 Louisiana, 295.

The judgment of the District Court is, therefore, affirmed, with costs.

JESSE KENNEDY v. R. J. BEASELEY, administrator.

When a sale is made in writing, which contains no receipt for the price, nor acknowledgment of payment—the presumption will be that the money was not paid.

APPEAL from the District Court, Tenth District, Parish of Carrol, *Perkins, jr., J. Ryan*, for plaintiff. *Selby*, for defendant and appellant.

EUSTIS, C. J. This suit is for the sum of \$1250, being the alleged price of two slaves sold by the plaintiff to *Samuel Canady*, the administrator of whose succession the defendant is. The judgment was in favor of the plaintiff, and the defendant has appealed.

The defendant, in his answer, admitted the purchase by the deceased, and pleaded payment. It rested, therefore, with the defendant to establish his defence by proving his allegation of payment.

The sale was by an act under private signature. It recites that the plaintiff had sold *Canady* two negroes, for the sum of twelve hundred and fifty dollars. It contains no receipt for the money, nor acknowledgment of payment. According to the uniform practice in this State, when money is paid on a contract mention of the fact is made by an express acknowledgment, or some equivalent term. *Seznaidier v. Fleming*, 1 Martin, N. S., 257; Code, 2234. The act contains no such recognition, and we are satisfied from evidence *aliunde*, that the money was not paid.

No other issue having been made, except that of payment, there is no ground for reversing the judgment.

The judgment of the District Court is, therefore, affirmed, with costs.

STATE OF LOUISIANA v. THE JUDGE OF THE THIRD JUDICIAL DISTRICT
COURT, PARISH OF JEFFERSON.

The proviso to the second section of the Act of 22d March, 1848, relative to appeals and notices of judgment, does not apply to the parish of Jefferson.

IN the matter of an application for a Mandamus in the case of *Bach, Barnett & Co. v. A. Leopold. Levy, Intervenor.*

SLIDELL, J. This is the second application for the interposition of this Court, which has been made in this cause, and its decision turns upon the question of the plaintiffs' right to a suspensive appeal, under the circumstances of the case.

It appears that upon an execution taken out by the plaintiffs against the defendant, certain goods were seized. *Levy* intervened and claimed the ownership; he also asked damages. There was judgment in *Levy's* favor, ordering the restoration of the goods to him and awarding him damages. This judgment was signed on the 10th February, 1853. On the 21st February, 1853, the plaintiffs filed a petition, asking an appeal from the judgment, in general terms, and not specifying whether they desired a suspensive, or devolutive appeal. On the 25th, the Court signed an order granting an appeal, with a similar generality of language, and upon condition that the appellant should give bond, with good security, in the sum of \$650. A rule was subsequently taken in the Court below by *Levy*, upon the plaintiffs, to show cause why execution should not issue, upon the ground that the bond was insufficient for a suspensive appeal, &c. The rule was made absolute, and in doing so the District Judge remarked:

"In this case the intervenor and third opponent, *A. Levy*, has ruled the plaintiff to show cause why an execution should not issue upon the judgment rendered in his favor, upon the ground, that the amount of the appeal bond was insufficient. The judgment for the intervenor was for \$400 damages, and the delivery of certain movable property, being merchandize. The lowest estimative value that, under the testimony of the case, can be put on the merchandize was \$295. In taking a suspensive appeal, the party was bound to secure the sum of \$695, by giving bond in an amount exceeding that sum by one half, under articles 575, 576, C. P. According to this calculation, the bond should have been for \$1000 and upwards. But the bond actually filed is only for \$650. This falls far short of the rule prescribed by law, and, therefore, must be deemed insufficient to the execution of the judgment.

"It is ordered, therefore, that the rule be made absolute, and the third opponent and intervenor be authorized to issue execution upon the judgment rendered in his favor against the plaintiff in this case, and a writ of possession according to law."

An application was then made to this Court for a prohibition. The answer of the District Judge was:

"Your respondent ordered an execution to issue on the judgment rendered in favor of *Levy*, against *Bach, Barnett & Co.*, for the reason, that the bond filed by the appellants, *Bach, Barnett & Co.*, was insufficient in amount to sustain a suspensive appeal. He avers that the record of the case will show that judgment was rendered in favor of *Levy* for \$400 damages, and for the owner-

STATE OF LA. ship and possession of Merchandize, the lowest estimative value of which, ac-
 THE JUDGE OF THE cording to the evidence on file, was \$295. That the bond filed by the appellant
 THIRD JUDICIAL was for \$650, which your respondent considered insufficient in amount to oper-
 DISTRICT COURT. ate as a stay of execution on a judgment for movables and money, amounting
 to \$695.

"Your respondent refers to the copies of the record for the facts of the case to sustain the foregoing statement, and, submitting these his reasons, most respectfully prays to be hence dismissed."

"J. CALVETT CLARK, Judge."

For these reasons, and considering also the ruling in 4th An'l, p. 8, *Byrn v. Riddell et al*, and *Marshall v. Grand Gulf Railroad Company*, 5th An'l, p. 861, we dismissed the application. See ante, p.—

The present application is made on the ground that the plaintiff, on the 14th March, tendered a new bond, in the Court below, for \$2500, and that they have a right to a suspensive appeal within 15 days after the adjournment of the Court, on the last day of the February term. They rely on the statute of 1843, p. 40, which provided as follows :

"Section 2. That the articles, 575 and 624, of the Code of Practice, be so amended that whenever an answer has been filed in a suit in which the defendant has had personal service made upon him, to appear and file his answer, or when a judgment has been rendered in a case, after answer filed by the defendant, or by his counsel, the party cast in the suit shall be considered duly notified of the judgment, by the fact of its being signed by the Judge. Provided, that in the country parishes no execution shall issue in cases where an appeal lies until fifteen days after the adjournment of the Court, by which the judgment was rendered, within which delay a party may take a suspensive appeal, on filing petition and appeal bond, as now provided by law."

The District Judge has refused to grant a suspensive appeal.

The subject is one involving the practice of the District Court of the parish of Jefferson, which is regulated, in many respects, by statutes specially framed with reference to that Court. Upon these statutes the learned Judge of the District Court has been acting for several years. We must suppose he has, necessarily, given them repeated and careful consideration ; and his interpretation, under such circumstances, is entitled to great deference, and ought not to be disturbed by us, unless it should seem, upon a careful scrutiny, manifestly erroneous.

Those statutes are numerous. The multiplicity of legislation was, perhaps, the necessary consequence of the inherent difficulties which attended the organization of the new judiciary system under a new constitution ; although it is certainly to be regretted (if such a course had been possible) that all the legislation, touching that Court, had not been embraced in a single act. There are, in those statutes, if superficially examined, seeming inconsistencies of phraseology, and, perhaps, some occasional obscurity with regard to the intention of the lawgiver. But upon the whole, after carefully comparing the various acts, we have come to the conclusion adopted by the district Judge, to wit : that the intention of the legislature was to distinguish, in many respects, the practice of the District Court of Jefferson from what may be termed the *country* Courts ; and to assimilate it to the practice of the city of New Orleans, of which the town of Lafayette then substantially formed a part, and with which city Lafayette has been subsequently incorporated.

It seems to us, therefore, that the District Judge did not err in refusing to apply to his Court the provisions of the Act of 1843. It would be unnecessary to cite in detail the language of the later statutes. We shall content ourselves with a reference to them.

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THIRD JUDICIAL
DISTRICT COURT.

See Acts of 1846, p. 45, 56, 68, 99, 110.

It is, therefore, ordered that the application be dismissed, and that the applicants pay costs.

L. A. DAVIS, adm'r, v. CHAS. H. DAVIS.

In a suit on an obligation by private writing, the plaintiff is not required to prove defendant's signature, unless it be expressly denied: and if a judgment by default be taken, it is, in legal intendment, a joining of issue without a denial of the signature.

When plaintiff prayed, in an amended petition, that defendant might be ordered to declare, on oath in open Court, on a day to be fixed, whether a certain account was not correct—a judgment by default cannot be confirmed on the day after the filing of such petition, without any day having been fixed for defendant to answer, and without answer to the interrogatories.

A PPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Burk, J.* No Counsel appeared for the plaintiff. *Ratliff*, for defendant and appellant.

Rost, J. This is a suit upon three promissory notes of the defendant, and also upon an account for medicines furnished, and fifty dollars, money loaned. The plaintiff took a judgment by default, which was made final after the legal delays. The defendant has appealed, and alleges, as a ground of error in this Court, that no part of the plaintiff's claim was proved, as required by article 312 of the Code of Practice.

The claim for money loaned was not allowed by the District Court. It is, therefore, unnecessary to consider it.

It is true that article 312 of the Code of Practice provides, that the plaintiff must prove his demand in all cases; but it is also true that under the dispositions of arts. 324 and 325 of the same Code, when the demand is founded upon an obligation under private signature, which is alleged to have been signed by the defendant, he is bound to declare, in his answer, whether or not he acknowledges his signature, and that the plaintiff is only called upon to prove it when it is expressly denied. In legal intendment, the issue in this case was formed when the judgment by default was entered on the records of the Court, and as on such an issue, there is no express denial of the defendant's signature, this Court has held, on a former occasion, and is still of opinion, that it need not be proved. See 7th Annual, p —

The plaintiff filed an amended petition, praying that the defendant might be ordered to declare on oath in open Court, on a day to be appointed by the Court, whether the account of medicines, annexed to the original petition, was not correct, and the day after the filing of this petition, without any time having been fixed, or any answer made to the interrogatories, the judgment by default was made final, and the amount to which they had reference, appears to have

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been allowed. This allowance was evidently premature, and the defendant is entitled to relief *pro tanto*.

It is ordered that the judgment be reversed.

It is further ordered that the judgment be rendered in favor of the plaintiff, in her capacity as administratrix, and against the defendant, *Charles H. Davis*, for the sum of nine hundred and five dollars, twenty-eight cents, with 8 per cent. interest on six hundred and seventy dollars and fifty cents, from 1st January, 1851, until paid, and interest, at the same time, on one hundred and nineteen dollars and seventy-eight cents from the 15th May, 1851, and legal interest from judicial demand on one hundred and fifteen dollars.

It is further ordered, that for the sum of sixty-four dollars and seventy-two cents there be judgment against the plaintiff as of nonsuit.

It is further ordered that the defendant pay the costs of the District Court. Those of this appeal to be paid by the plaintiff and appellee.

WM. J. SHARP v. CHARLES H. DAVIS.

ROST, J. The facts of this case are substantially the same as those in the case of *L. A. Davis, adm'x. v. Charles H. Davis*, just determined. The plaintiff sues upon a promissory note of the defendant, and claims also from him the hire of certain slaves. The defendant having failed to appear, a judgment by default was taken against him, and, after the legal delays, made final, without any proof of the plaintiff's claim. For the reasons given in the case of *Davis*, the judgment, so far as it allows the hire of slaves, must be reversed.

It is ordered, that the judgment, in this case be reversed. It is further ordered, that the plaintiff recover from the defendant the sum of eight hundred dollars, with 8 per cent. interest, from the 1st January, 1850, till paid, subject to the following credits, to wit: \$100, paid 17th February, 1851; \$222 78, paid 23d August, 1851; \$100, paid December 15th, 1851.

It is further ordered, that upon the claim for the hire of slaves, there be judgment against the plaintiff as of nonsuit.

It is further ordered, that the defendant pay the costs of the District Court, and the plaintiff those of this appeal.

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THE STATE v. THE JUDGE OF THE FOURTH DISTRICT COURT OF
NEW ORLEANS.

No mandamus will be issued when the applicant has an adequate remedy by appeal.

IN the matter of *John Weisse*, praying for a Mandamus, in the case of *Weisse v. Magdaline Ginder*, his wife. *Upton*, for the applicant.

SLIDELL, J. *John Weisse* has presented his petition for a mandamus, accompanied by an affidavit and transcripts of certain records. He alleges that the

Judge of the Fourth District Court, of New Orleans, has committed a denial of justice, in refusing to sign a judgment duly rendered in his Court, and that no adequate remedy is left him except the writ of mandamus; that the transcripts, which he files, show the judgment in question was properly obtained, and that a subsequent *ex parte* judgment, rendered by the District Judge without lawful cause, should be set aside. Wherefore he prays a rule upon the District Judge, to show cause why a peremptory mandamus should not issue, commanding him to sign the first mentioned judgment, and why the *ex parte* decree should not be annulled.

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ORLEANS.

The circumstances exhibited by the evidence, which accompanies the application, are as follows: In January, 1853, a judgment was rendered by the District Court for Jefferson, by which *Weisse* was separated from bed and board, in his suit against Magdaline; the community was dissolved, and the custody of their children was awarded to her. This suit was founded upon charges of the wife's misbehavior, her abandonment of the matrimonial domicile, &c.

On the 7th February, 1853, *Weisse* instituted, in the Fourth District Court of New Orleans, another suit against his wife. In his petition he alleges, that since several years, she had absented herself from his domicile, without lawful cause, &c.; and asks a decree of divorce. A judgment by default was taken, and on the 8th March, 1853, after hearing evidence, it was confirmed. It was decreed that the bonds of matrimony, between the plaintiff and his wife, be dissolved, and that she pay the costs of suit. Before this judgment had become final by the signature of the District Judge, the decree, rendered in the District Court of Jefferson, appears for the first time to have been brought to his notice; and on the 14th March, he, *ex officio*, caused to be entered an order, in which after reciting the decree in Jefferson, he declares his opinion that the institution of the suit in his Court was improper, and orders the judgment of divorce, rendered on the 28th March, to be set aside, and that the suit be dismissed at the plaintiff's costs.

Any present consideration of the merits of this controversy would be superfluous and premature. The sole question now before us is, whether a mandamus should issue as prayed for.

Considering the importance of the subject, and the frequency of such applications, we have taken pains, long since, to define the powers of this Court touching the writ of mandamus, and explain the circumstances under which it would be issued. It seems surprising then, at this late day, any misconstruction on the subject should exist. It is abundantly settled that this Court disclaims any general superintending control over the District Courts, and limits its summary actions to those cases where its interposition is necessary for the maintenance of its appellate jurisdiction. These principles were repeatedly recognized by our predecessors; and we considered them as resting upon a wise policy, and a sound exposition of the constitution under which our State has been governed. From those principles was naturally deduced the well settled rule that a *mandamus* will not be issued where the applicant has an adequate remedy by appeal. See *Succession of Macarty*, 2 Annual, 980.

Applying this rule to the case before us, it is obvious that the writ of mandamus ought not to issue. The judgment of 8th March, 1853, being unsigned, was incomplete. It was open to revision by application for a new trial, which the judge might even command *ex officio*. *Gale v. Kemper*, 10 Louis'a, 209;

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Smith v. Delahoussay, 9 Rob., 50. His power also extends, not only to the setting aside an incomplete judgment, but to a dismissal of the cause. If this power be unduly exercised, the party who conceives himself injured has his remedy by appeal. It is not even suggested that the District Judge has refused to sign the judgment of dismissal, so as to put the plaintiff in a position to appeal; and this Court cannot presume he would refuse to do so.

Any consideration of the correctness or incorrectness of the judgment of dismissal, at the present time, would be obviously premature.

It is clear that there is no ground for a mandamus, as prayed for. The application is, therefore, dismissed, and the applicant is to pay the costs of the application.

ROBERT M. LEA, tutor, v. GEORGE W. RICHARDSON AND WIFE.

Though the mother be excluded from the tutorship of her minor children by contracting a second marriage, she does not thereby forfeit her maternal power; but still retains, paramount to the tutor, the right of rearing and educating them.

APPEAL from the District Court, Seventh District, Parish of West Feliciana, *Stirling, J. Muse*, for plaintiff and appellant; *Ratliff*, for defendants.

EUSTIS, C. J. This appeal is taken by the plaintiff, *Robert M. Lea*, who is the tutor of *Letitia E. Edwards*, a minor under the age of ten years, from a judgment of the Court of the Seventh District, sitting in the parish of West Feliciana, by which the defendant, *Narcissa J. Richardson*, wife, by second marriage, of *George W. Richardson*, and the mother of the minor, was maintained in the custody and control of her child.

There are several questions which have been urged before us on this appeal, but we only consider it material to determine that which relates to the right of the mother to be protected in the possession of her child.

Admitting that the mother, by contracting a second marriage without applying for a family meeting, forfeited the tutorship of the child, and that she has formally renounced all claim to it, and that the plaintiff has been duly appointed tutor in the place and stead of the mother, it by no means follows that the judgment of the District Court ought to be reversed.

By the Spanish law the widow retained the right of rearing and educating her minor child, if she was of good reputation; but, on her marrying, the child was immediately withdrawn from her power; for as "the antient sages have said, a woman is wont to love her new husband so much that she may not only give him the property of her children, but may consent to their death for the sake of pleasing him." Partida 6th, tit. XVI, law 19; Institutes of the law of Spain, book 1, tit. 3.

This law is repealed, and its sinister spirit has no place in our morals. The article 271 of the Code provides, that the mother who refuses the tutorship of the children, retains the superintendence of them, and the care of their education.

By the Roman law the mother and grandmother, by a second marriage, lost the right of tutorship of their children and grandchildren. But with regard to the custody and education of the children, the mother, by a second marriage,

only forfeited the right of their being *exclusively* committed to her charge. *Makelley* on the Roman law, § 536.

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In the case of *Delia Webb*, at the suit of *Amos Webb*, 7th Annual, page —, this Court held that, by the exclusion from the tutorship of the children on the part of the mother, by reason of a second marriage, she did not lose her maternal power, which was, in respect to the children, paramount to that of the tutor, and still retained the right of rearing and educating them.

There is not the slightest reproach on the conduct, or repute, of the mother, or her husband. It seems they have no establishment of their own, but board at the house of her sister. There is no suggestion of any danger of unsuitable association to which the minor would be exposed, and as the District Judge had the child and the mother before him, he had every opportunity of forming a correct opinion of the best means of promoting the welfare of the party in whose interest he was called upon to act.

It appears that the child had lived with the plaintiff, no doubt with the free consent of the mother, and, it is urged, she was seduced from his house by stratagem. Before we condemn the artifices of a mother in getting possession of her child, we should bear in mind that they have their origin in the intensity of natural affection, and when we find this love reciprocated, and the child pleading against being separated from the author of its being, we must admit that nothing human, at her age, can present stronger guarantees for her future well being. If the child lived with the plaintiff with the consent of the mother, that consent could be withdrawn; and we have nothing before us on which we would be authorized in disturbing the judgment of the District Court.

The judgment is, therefore, affirmed, with costs.

GEO P. SALTENBERRY v. RICHARD LOUCKS et al.

The Act of 1844, requiring bond to be given to the State by the Register and Receiver of the Land Office, does not provide for the transfer, or assignment of it to individuals aggrieved by the Register. And it is not seen how the obligation of the sureties to the State can be extended by implication, so as to inure to the benefit of third persons.

The condition of the bond is, that Loucks shall well and faithfully do and perform all the duties required of him by law, in his capacity of Register of the Land Office. To receive the price of lands sold is not one of his official duties:—that is expressly assigned to the Treasurer. The plaintiff deposited the price of the land bought by him with the Register. He made the Register his own agent, and the sureties have not warranted against the risks of this agency.

APPPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson, J.*

ROST, J. The Act of 1844, under which the defendant *Richard Loucks* was appointed Receiver and Register of the Land Office, required that he should give good and sufficient security to the State for the faithful discharge of the duties of the office, and the bond sued upon was given in compliance therewith.

In 1851, the plaintiff made application to *Loucks* to purchase certain lands, and paid him the sum of \$725; whereupon *Loucks* delivered to him a certificate showing that said sum had been paid by the plaintiff, as required by law,

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and that he was entitled to the land. The money paid to *Loucks* was not paid over by him to the Treasurer, and he made no entry of the purchase on his books. The successor of *Loucks*, for these and other reasons, refused to issue a patent for the land. The question raised by the issue is, whether the securities of *Loucks*, on his bond, are liable to the plaintiff.

The Act of 1844, requiring the bond to be given, does not provide for the transfer or assignment of it to individuals aggrieved by the register. It is, on its face, in favor of the State alone, and we do not see how the obligation of the sureties can be extended, by implication, so as to inure to the plaintiff's benefit. But if it could be, the plaintiff's case is not made out.

The condition of the bond is, that *Loucks* shall well and faithfully do and perform all the duties required of him by law in his capacity of Register of the Land Office. To receive the price of the lands sold, is not one of the duties required of him by law—that duty is expressly assigned to the State Treasurer. The plaintiff, knowing this, deposited the money in the hands of *Loucks*, thus constituting him his agent to make the payment. It is no part of the undertaking of the sureties to warrant against the risks of that agency.

The grounds that the land sold was not in the district of *Loucks*, and did not belong to the State at the time of the sale, would only give the plaintiff the right to have the money refunded, if he had paid it into the Treasury. Land thus situated can no more be said to have been sold, in discharge of the duties of the office, than if it had been in Maine or California, and the maxim of *causat emptor* would apply equally to either case.

Judgment affirmed, with costs.

THOMAS PRENDERGAST v. MARGARET CASSIDY and ALEXANDER SHAW,
her husband.

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When a married woman, not separated in property, is engaged in trade, she will be presumed to trade on the funds of the community in the absence of proof to the contrary, and the assets in her hands will be liable for community debts.

The profits of the labor of husband and wife belong to the community.

APPEAL from the District Court, Sixth District, *Robertson, J. J. W. Seymour* and *A. S. Herron*, for plaintiff. *Elam*, for defendants and appellants.

Rost, J. In 1846 *John P. Michel* and wife executed an act of donation of a certain piece of land in favor of *Margaret Cassidy*, who accepted the same, and made them at the same time a manual gift of the sum of eleven hundred dollars, which was the full value of the land.

The plaintiff, who is a judgment creditor of *Alexander Shaw*, the husband of the defendant, seeks to subject that property to his judgment on the ground that the donation was a sale in disguise, made to the wife during the existence of the community to which the property sold belongs.

The only defence, besides the plea of the general issue, is that the petition fails to disclose any legal right which can divest the defendant of her title.

There was judgment below, decreeing the land in controversy to be the separate and paraphernal property of the defendant, *M. Cassidy*, purchased with

her separate funds, and dismissing the plaintiff's petition. From that dismissal the present appeal is taken.

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It is conceded that the donation was, in truth, a sale. There is no plea in the answer that the price was paid with paraphernal funds, or that the defendant had any such funds; and no evidence in support of either of these facts is found in the record.

It is shown that the defendant kept a milliner's shop, and that she traded on her own account; but as the case is placed before us, we are under the necessity of presuming that she traded with the funds of the community; if she did, the entire assets in her hands were at all times liable for the community debts; if she did not, the profits out of which the purchase seems to have been made, would still be common under the disposition of the Code, which classes as community property the produce of the reciprocal industry and labor of both husband and wife. C. C. 2371. The only mode in which the defendant could evade that disposition of law, would have been to obtain a separation of property to which her industry, and the improvidence of her husband, would no doubt have entitled her.

This view of the case renders it unnecessary to determine whether the defendant, who holds under a simulated act, could, in any event, be considered as a *bona fide* purchaser in her own right, and if she could be, whether the evidence that she did so purchase should not be found in the act itself.

It is ordered that the judgment be reversed. It is further ordered that the property, described in the petition, be, and it is hereby adjudged to belong to the community existing between the defendant and *Alexander Shaw*, her husband, and liable as such to be seized under the judgment of the plaintiff against *Alexander Shaw*, also described in the petition, and it is further ordered that the defendants pay costs in both Courts.

NEW ORLEANS AND CARROLLTON RAILROAD COMPANY v. W. W. CHAPMAN.

A promise to the creditor to pay the debt of another is binding, and requires no consideration, or foundation, but the original debt.

APPEAL from the District Court, Seventh District, *Stirling, J. Brewster & Collins* and *Merrick*, for plaintiff. *Bowman & De Lee*, for defendant and appellant.

DUNBAR, J. The defendant is appellant from a judgment rendered against him on two promissory notes, executed by himself, to his own order, and delivered to the plaintiffs. Various grounds of defence are set up in his answer, and two amended answers. In the original answer he admits the execution of the notes, and that he is bound thereon—that he gave them to take up a debt due by his father to the plaintiffs, his father being insolvent; but that the plaintiffs agreed to give him a reasonable time for their payment, and that if this is accorded, he is still willing to pay. In his amended answer he avers, that the debts of his father, for which he executed the two notes sued on, consisted of two drafts and a note, all drawn by *James Chapman*, the father—that he has just discovered that his said father was not liable on the drafts, in consequence of the *laches* of the plaintiffs, and that he has reason to believe that one of the drafts ought to have been credited on the note—that,

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therefore, he has erroneously given his obligations for a much larger amount than his father really owed, and that he is entitled to credit therefor, and that, in fact, making allowance for these errors, and crediting him with the amount of sundry collaterals placed in the hands of the attorney for the plaintiffs, he is entitled to a judgment in his favor for the excess.

In his second amended answer, defendant states that he was induced to give his notes, principally on the ground that the sureties, or accommodation endorsers of his father on the original drafts and note, were, as he supposed, liable for the same, and that, wishing to save them from loss, his father being insolvent, he took up the debt—that he has just ascertained that the said sureties were not liable at the time, having been discharged by the *laches* of the plaintiffs, and, on a portion of the debt, by prescription—that he, therefore, gave his own notes in error, and prays judgment accordingly.

The evidence establishes that *James Chapman* originally owed the plaintiffs the sum of thirty-six hundred dollars, for which they held his note, endorsed by *J. Nettles*—that at its maturity he executed a new note for \$3,200, giving a draft at ten months upon his factors, in New Orleans, for the curtailment and interest, amounting to \$674 45. This draft was endorsed by *J. Nettles*. When the note for \$3,200 matured, a new one was given for \$2,880, and a draft, in like manner, at ten months, given for curtailment and interest, amounting to \$589 67, also endorsed by *Nettles*. Both drafts were protested for non-payment, as well also the note for \$2,880. The latter matured on the 11th of February, 1844, and the drafts respectively on the 11th of December, 1842 and 1843. It is conceded that these three obligations formed the basis of the notes sued on, as well as one other note, which is not included in the present suit. *W. D. Winter*, a witness offered by defendant, states that the original claims were placed in his hands for settlement—and that, on receiving them, he addressed the defendant in reference to them—that defendant stated he was under no legal obligation to pay them, but that he had settled many of his father's debts since he became the purchaser of his property, and was anxious and desirous to settle them all, and would do so if the creditors would give him time. Witness also states, that an additional motive for settling was, that defendant did not wish his father's endorsers sued, who were then very much involved. That the note and drafts were all exhibited to defendant, and no representation made as to the liability of the parties thereto, other than that which really existed. The claims seem to have been placed in witness' hands for collection about the 21st June, 1846, and immediately thereafter the defendant promised to settle. The settlement was not, however, finally consummated till the 5th of February, 1848.

In the original answer of defendant, filed nearly six years after his first promise to pay, he acknowledges the validity of his obligations and simply asks for time.

We are satisfied, from the testimony, that *James Chapman*, the father, was indebted to the plaintiffs to the amount for which his son, the defendant, gave the promissory notes now sued on. To make a contract of this nature, a promise to pay the debt of another, valid, it is only requisite to show the pre-existence of the debt which one has promised to pay to him who is the creditor. This is the *pact constituta pecunie* and requires no further consideration or foundation than the original debt. Pothier, *Traité des Obligations*, 1st vol., p. 367, *Du Pact Constitutæ Pecunie*.

This view of the case renders it unnecessary to notice other questions argued NEW ORLEANS AND CARROLLTON RAILROAD CO. at much length in the brief of defendant's counsel.

It is, therefore, ordered, adjudged and decreed, that the judgment of the W. W. CHAPMAN. District Court be affirmed, with costs in both Courts.

ST. VICTOR BARRETT v. GENERAL MUTUAL INSURANCE COMPANY OF
NEW YORK.

THIS case should have followed that of the same Plaintiff v. The New Orleans Insurance Company of New Orleans. Ante p. 8. It is inserted here, because the argument for a re-hearing has been deemed of sufficient importance to be published.

ECSTIS, C. J. (*Rost, J.*, absent.) This is an action on another policy on goods shipped on board the schooner *W. C. Preston*. The facts are established in the same manner and to the same extent as in the other cases. For the reasons given in the case of *Lapeña & Ferré v. The Sun Mutual Insurance Co.*, [Ante p. 1,] the judgment in this case is affirmed with costs.

Briggs, for defendant, applied for a re-hearing.

In the sixth chapter of Arnould, 2d edition, § 243, it is stated that "in every policy of marine insurance there is an implied warranty that the ship shall be sea-worthy for the voyage, by which is meant that she shall be in a fit state as to repairs, equipments, crew, and all other respects to encounter the ordinary perils of the voyage insured at the time of sailing on it."

The reason of the rule is then given, and reference is made to the observations of *Lord Eldon*, in *Douglass v. Scoullall*, 4 Dow. 276, and of *Lord Redesdale*, in *Wilkie v. Geddes*, 3 Dow. 60.

And the author proceeds to say, that "The Courts have accordingly held that the sea-worthiness of the ship for the voyage, when she sails, is a condition precedent to the underwriters' liabilities for any loss incurred in the voyage."

If she be not so sea-worthy, says *Lord Ellenborough*, "from whatever cause this may arise, and though no fraud was intended on the part of the assured, the underwriters may answer, 'We are not liable.'"

At page 655—"Thus in an action brought by an innocent shipper of goods, (who had no interest whatever in the ship,) on proof being given that the ship was unseaworthy when she sailed, *Lord Mansfield* non-suited the plaintiff, saying that the implied warranty could not be dispensed with in any case, and that is now well understood to be the law of England on this subject." *Oliver v. Cowley*, Park on Ins., 470, 8th London Edition.

He then proceeds: "The proposition indeed 'that the implied warranty of seaworthiness cannot be dispensed with in any case,' though unquestionably true as a general rule, must yet be understood with some limitations; for the following case shows, that if a ship having originally sailed in an unseaworthy state, puts back immediately on discovering the defect, and the underwriters agree to waive the objection, and allow her to proceed on her voyage a second time, (on which occasion she sails seaworthy,) they cannot afterwards set up the plea of her original seaworthiness as a defence against any subsequent loss totally unconnected therewith." Which brings us to the case of *Weir v. Aberdeen*, 2 B. & A., 320, and which we shall now proceed to examine.

We must first, however, in order to test the force of this and other cases, establish our definitions.

Seaworthiness for the voyage does not attach title till she sails, says *Mr. Justice Lawrence*, *Annan v. Woodman*, 3 Taunt.

Of course, if she ultimately sails unseaworthy for the voyage, this according to the rule laid down, wholly discharges the underwriter from all liability for loss on the voyage, although the policy may have attached on her while "at" the

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port, owing to her having been *there* seaworthy for her *then* risk. *Partee v. Potts*, 3 Dow. 27. Per Park, arguendo in *Watson v. Clark*, 1 Dow. 336, cited Arnould, 2, 674-5.

This warranty according to the law of England, is satisfied if the ship *sails* in a seaworthy condition—the assured makes no warranty that the ship shall continue seaworthy in the course of it. *Lord Mansfield* in *Berman v. Woodbridge*, Doug. 758. *Lord Mansfield* in *Elden v. Robinson*, Doug. 755, cited by Arnould, p. 657.

The *second description of seaworthiness* is that for port or inland navigation.

There are in fact different degrees of seaworthiness. Seaworthiness for the *voyage* is one thing; and seaworthiness in port or for inland navigation, &c., quite another. *Forbes v. Wilson*, Park on Ins., 472, 8th London edition, and Arnould, page 673, § 249.

This then is the doctrine of the English tribunals, and is the law of England now, and was in 1819, when *Lord Tenderden* as Chief Justice of the Court of King's Bench, delivered his opinion in *Weir v. Aberdeen*, and it is quite impossible that he and his associate Judges should be entirely unacquainted with the subject which we are compelled to believe if his declaration that he "was a little surprised at the proposition," be not considered to have reference to that which was in fact the turning point in the case.

The report is somewhat meagre, but it begins thus: "Action upon a policy of insurance, dated 21st Feb., 1817, on the ship *Prince Cobourg*, and her outfit at and from London to Bahia; and the declaration stated that the following memorandum of the 5th April, 1817, was endorsed upon the policy. *It is agreed, that the Prince Cobourg may load, unload and reload goods, and discharge part of her cargo at Ramsgate.* Plea non-assumpsit.

It is needless to narrate the facts which are of course well known to the Court, and are set out in the opinion.

It was objected on the part of the defendant that the ship having been overladen, was unseaworthy at the commencement of the voyage, and that the memorandum was invalid, for want of a new stamp, and also from having been obtained without making a due communication to the underwriters. The learned Judge (*Best*) however was of opinion, "that this being a policy on ship, the risk had commenced before any goods had been laden, and he left two questions to the jury; first, whether, when she sailed from Ramsgate, she was properly laden, and in a seaworthy state; and secondly, whether the subsequent loss had been occasioned by the circumstance of the vessel having been overladen between London and Ramsgate." The Jury found that she was seaworthy when she sailed from Ramsgate, and that the subsequent loss had no relation to her unseaworthiness between London and Ramsgate, and a verdict was entered for plaintiff.

Now the Court will find in the opinions refusing a rehearing, that the attaching of the policy whilst the ship was in port and before loading, was considered as avoiding the necessity of a new stamp, the policy not having failed ab initio, and the defect being cured by the waiver of the objection, the original stamp was sufficient; and although the opinion of *Best* in the report is not set out, it was of course on this ground that he considered it material. It legalized the contract which by the memorandum was considered as commencing at Ramsgate.

On the motion for a new trial, it was again urged, 1st, that her having sailed in an unseaworthy condition, was a breach of a condition precedent; and 2d, "that supposing the policy to have attached, the putting into Ramsgate was a deviation; for the memorandum could not avail the plaintiff, inasmuch as it operated as a new policy, and therefore required a new stamp, and the liberty there given was obtained from the underwriters without having disclosed the important fact that the vessel had strained much owing to her having been overladen, or that a protest had been made."

We now come to the opinion of Chief Justice *Abbott*, who says: "It appears in this case that the vessel at the time of her departure was not in a fit condition to perform her voyage, in consequence of her having at that time a greater cargo than she could conveniently or perhaps safely convey. The master having discovered this, and having met with bad weather, (which was perhaps the cause of the discovery being ever made,) put back into the Downs, and having obtained permission to go into Ramsgate for the purpose of discharging part of her cargo, went there and did land some portion, and so having removed the objection that had previously existed, put the ship into a fit condition to perform the voy-

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age, and the Jury have found that the loss which subsequently happened, was in no degree attributable to the condition in which she had originally sailed, and from which she had freed herself by discharging part of her cargo at Ramsgate. *But it is said that this memorandum expressing the consent of the underwriters is void, and that in order to bind the underwriters, a new contract was necessary, inasmuch as the fact of the vessel having once sailed with a cargo greater than was proper for that voyage, and therefore in an unseaworthy state, wholly put an end to their liability on the policy.* That proposition would go the length of establishing that if a vessel at the outset of the voyage be by mistake or accident unseaworthy, owing to some defect which is immediately discovered and remedied before any loss happens in consequence of it, still the policy would be void and the underwriters not liable. I confess that I was a little surprised at that proposition, because if true in point of law, I fear we should find many cases indeed, where it would turn out that the assured could have no claim upon the underwriters, because something was wanting, or something excessive at the instant of the ship's departure, although the want had been supplied or the excess removed before the loss happened. Suppose for instance a vessel is unseaworthy, unless she has two anchors, being destined for a long voyage, and she sails from London to Gravesend with only one, shall it be said that if no loss happens between London and Gravesend, and the vessel at Gravesend takes on board her second anchor and then proceeds on her voyage, that the underwriters are *not liable for a subsequent loss, and that the policy is completely at an end, that even if the underwriters agree to waive the objection, and to allow her to proceed on her voyage, then consent shall be unavailing.* These inconveniencies which would be continually occurring in practice, would lead to dangerous consequences, by opening the door to the underwriters to break their engagements by means of trivial circumstances, the effect of which no one can contemplate. *I think, therefore, the proposition cannot be maintained.* As to the objection that this was a deviation, it is sufficient to answer that it was done by the permission of the underwriters with respect to the communication made to them, it was quite clear that the underwriters were told all that was in substance necessary for them to know, for they were told that when the vessel sailed she had too large a cargo on board, and that she was not in a situation fit to perform her voyage. Upon the whole, therefore, I think that the rule must be refused."

We would now ask, what were the propositions before the Court? We take them to be those stated on the application for a new trial. First, *that the policy never attached; and that if it did, the putting into Ramsgate was a deviation, because the memorandum endorsed on the policy was void, inasmuch as it operated as a new policy, and therefore required a new stamp; and because important facts were not disclosed to the underwriters.*

Now we have seen that on the trial, *Best, J.* held, that being on *the ship*, it did attach, because she was seaworthy for her then condition; and as, by the memorandum, the underwriters had waived a defence, which would, but for the waiver, have availed them, the waiver by endorsement, related back to the original execution of the contract, and did not constitute a new contract, requiring a new stamp. That the consent was considered to have disposed of the plea of *deviation*, is too plain to require illustration. The opinion is awkwardly expressed, but no doubt can exist in the mind of any one, it seems to us, that the whole must be construed together, and that when *Lord Tenderden* expresses his surprise at a doctrine which *was* then, and *is* now, admitted to be law, the concluding paragraph "that even if the underwriters agree to waive the objection, and allow her to proceed on her voyage, their consent shall be unavailing," must be considered as inducing the declaration, that *upon the whole*, he thought the rule must be refused.

This construction is warranted by the opinions of the other Judges. *Bayley, J.*, says, *I am of the same opinion.* There was not any fraud or concealment in this case, so as to vacate the memorandum; for it distinctly appears that the underwriters were told that the ship had been overloaded, and that from that circumstance she was in an unseaworthy state. As to the fact that the ship had strained, it is to be observed, that if that straining had rendered her unseaworthy, the non-communication of that fact would have vacated the policy; but as the jury negated that fact, it was immaterial. The question then is, whether the memorandum required a new stamp, and the case of *Hubbard v. Jackson*, 4 Taunt. 174, is an authority to show that a warranty may be waived without a new stamp. Now it is a warranty that the ship shall be seaworthy, and therefore it

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does not require a new stamp in order to waive it. On these grounds, I am of opinion that the memorandum in this case did not require a new stamp, and that the verdict is right."

Holroyd, J. "I am of the same opinion. I do not think that the overloading which rendered the ship unseaworthy at the time of her sailing, made an end of the policy. The inconveniences which have been pointed out, induce me to think that such a proposition is contrary to law; no authority has been cited in support of it; and unless some cogent authority were produced, I should not accede to it. It appears to me that the risk continued to the term of the loss, and that the plaintiff is entitled to recover."

Now here is authority stronger than that of the C. J., if the language is to be understood without reference to the particular facts of the case, or the *quo animo* with which it was employed. *Bailey, J.*, is also of the same opinion with the Chief Justice, and yet distinctly tells you that seaworthiness is a warranty! and that as it has been decided that a warranty may be waived or modified at any time prior to the natural termination of the risk without a new stamp, therefore this waiver was good without a new stamp, and therefore the plaintiff was entitled to recover—in other words, that the endorsement related back to the date of the original policy, which to this extent was not destroyed; and this is all that *Lord Tenderden* ever intended to say, or that *Holroyd* or *Best* intended to say.

Had the memorandum of waiver not been there, does the Court undertake to say that the underwriters should have been held liable? That the breach of a warranty of seaworthiness for the voyage occurring on the departure of a ship for London, could be cured at Ramsgate! if so, why not at Madeira, or at any port short of that of her destination? and what becomes of the *general rule*? and yet if the view the Court has taken of it be correct, to this conclusion we must come. *Lord Tenderden* must be understood as declaring that a warranty once broken can be subsequently cured without the consent of the underwriters, a doctrine we are quite sure his lordship never heard broached in Westminster Hall, and are equally sure he is innocent of having originated.

The doctrine is fully and unconditionally asserted in Sergeant Marshall's treatise upon the law of insurance, the first edition of which was published in 1802, and the second in 1808, and in Mr. Justice Park's work, published in 1786. It is, as we have before observed, impossible to conceive the Court surprised, or considering this doctrine as a novelty.

That the very portion of the opinion relied on, which has been quoted by writers as establishing this novel doctrine should be considered a dictum, we should infer from the illustrations put. His Lordship talks of accidental deficiencies or excesses immediately discovered and corrected, and supposes a vessel navigating from London to Gravesend with one anchor, and there taking in the other. This is *ricer navigation*, and he well knew that for such a risk the seaworthiness of the voyage is not exacted, and that in the instance put, the underwriters would be bound by other principles of law. But if intended to meet the point raised at bar, *they are full of significance*, for it was argued that the risk never attached, that the breach of the warranty so completely avoided the contract, that the endorsement must be considered as a new acceptance of the risk, a new contract between the parties; and as such wanting a stamp to give it validity. This *Best* at the trial answered by saying that the policy being on the ship, attached before loading; and in this view, and with this intendment, the case put is such as might be expected from Chief Justice *Abbott*, and ceases to be inappropriate, as to our humble judgment it would be, were the popular reading of this opinion to be admitted as correct.

He never considered that these observations would, *apart from the facts of the particular case*, be construed as overturning a doctrine so completely settled, or that they would be considered in themselves decretal.

The recent work of *Mr. Arnould* has, however, accepted the result of our examination as its true exposition, since in the second edition of his work on Insurance, p. 657, he says after citing the authority: "It must be understood, however, that this doctrine is *strictly limited* to cases, in which there is clear evidence both that the underwriters have agreed to waive the objection to the ship's original want of seaworthiness, and also that the subsequent loss was wholly unconnected therewith.

To the English doctrine and definitions, that seaworthiness for the voyage is a

condition precedent, and satisfied if the ship sails in the required condition. And that this complete equipment is not required for port or inland navigation.

The American system of jurisprudence has added a third and qualified warranty, the nature of which together with the recognition of the English as the general rule, is clearly set forth in *Starbuck v. New England Insurance Co.*, 19 Pickering, where the Court says: "The obligation of the assured to have his vessel seaworthy at the commencement of the voyage, and his obligation to keep her seaworthy during this voyage, depend on different considerations, and impose different duties. *If the assured does not make her seaworthy at first*, she is not a vessel. But, if she meets with an accident *after* the beginning of the voyage, as the very contract of insurance supposes that she may, it is the duty of the assured to make repairs." If he does not repair, when he reasonably ought to do so, and a loss arises from it, the assured cannot recover, because it is not a loss by any of the perils insured against; but if the loss arise from another cause, he may recover. The difference is this: If the vessel is not seaworthy at first, *the policy never attaches*; in the other case, the insurers having become responsible, continue liable for all losses *not arising from the fault of the owners, &c.* See *Copeland v. New England Insurance Co.*, 2 Metcalf, 432, 437.—*Paddock v. Franklin Insurance Co.*, 11 Pick. 227, 234.

We shall now examine the American doctrine and the cases cited in support of this supposed qualification of the general rule, and will begin with *Kent*, who in speaking of this warranty, says, p. 858: "This warranty of seaworthiness relates to the commencement of the risk, and the warranty is not broken if she becomes unseaworthy afterwards," and then goes on to notice the American doctrine with reference to the obligation to keep the ship in this condition, and says: "A breach of the implied warranty of seaworthiness in the course of the voyage has no retrospective operation, and does not destroy a just claim to damages for losses occurring prior to the breach of this implied condition." "Every warranty is a part of the contract;" "it differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and literal performance. Whether the thing warranted be material or not, and whether the loss happened by reason of a breach of the warranty, or did not, *is immaterial*, a breach of it avoids the contract *ab initio*. Every condition precedent requires a strict performance to entitle a party to his right of action. But seaworthiness in port may be one thing, and seaworthiness for the whole voyage quite another."

He then, as in the case with all the writers except Arnould, takes up *Weir & Aberdeen*, and after stating that the general rule is that a "vessel must be seaworthy at the commencement of the risk, whatever that risk may be, in order to make the policy attach and charge the insurer," observes: "*It was held in the case of Weir v. Aberdeen*, that though a ship be unseaworthy at the commencement of the risk, yet if the defect be cured before a loss, a subsequent loss is recoverable under the policy. The argument of *Lord Tenderden* in favor of this doctrine is *very weighty*, but a doubt seems to have been thrown over its solidity by the Supreme Court of the United States, referring to 1 Peters' R. 170."

We have here the doctrine laid down as we have stated it, and the only exception cited is that of the case we have reviewed, and yet this is the doctrine which *Lord Tenderden* is supposed to have treated as novel, and as one which surprised him.

In the case referred to, Judge *Story*, in reference to the case in question, merely says: "In this point of view it is not necessary to rely on the doctrine of Mr. Chief Justice *Abbott* in *Weir v. Aberdeen*, which goes the length of asserting that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before the loss, the subsequent loss is recoverable under the policy. *This is an important doctrine*, and well worthy of discussion, whenever it comes directly in judgment."

Here the Court will find the tables again changed, and both Chancellor *Kent* and Mr. Justice *Story* treating the opinion of *Lord Tenderden* as heresy, and one at which they might express surprise.

We shall now refer to Mr. *Phillips*, and the authorities he has cited in support of this doctrine, and see whether they are more to the point.

It is needless to refer to those which are in affirmation of the doctrine we are advocating, they will be found at p. 808, 829, second edition.

The quotation from this author, cited by the Court, we are unable to find, and it must therefore be an addition to or alteration of the text in the edition of which we have not seen.

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In that referred to, the 2d, he says, "That the effect of non-compliance with the warranty of seaworthiness, as well as of the forfeiture of any other condition, is to discharge the underwriters from their liability under the policy." If this condition is forfeited at the commencement of the risk, it doubtless discharges from all liability under the policy; "but it does not appear that a forfeiture of this condition, subsequently to the commencement of the risk, discharges the underwriters from their liability to pay antecedent losses; on the contrary, the underwriters are liable for previous losses;" and *Annan v. Woodman*, 8 Taunt. 299, and *Taylor v. Lowell*, 3 Mass. 347, are cited as authority.

We now come to our unfortunate case, which he introduces under the marginal heading of Temporary Unseaworthiness, and says: "Though it appears by many of the preceding cases that a non-compliance with the warranty of seaworthiness, discharges the underwriters from all subsequent liability, *yet it seems to be intimated*, in an opinion given by Chief Justice Abbott, that a non-compliance with this warranty may take place, and still, if the defect whereby it is violated is of a temporary nature, and soon remedied, and it appears that no loss could have occurred in consequence of the defect, the liability continues, or *revives*, notwithstanding such violation;" p. 380; and then sets out the opinion and the remark of Mr. Justice Story, in 1 Peters, already given thereon.

And at page 385 says: "In *Weir v. Aberdeen*, 'the circumstance that the policy was at and from the port, so that *the policy attached*, and the risk commenced before sailing was not expressly relied upon, or made the avowed ground of the decision; but such was the fact, and would seem to reconcile it with the decisions.'" That is, the breach was not at the commencement of the risk. This is, as we have shown, the very point in the case, if coupled with the waiver.—The fact was, as we have shown, directly decided by *Best*, and forms the leading feature in the judgment of Mr. Justice Bailey; and as we have endeavored to show, was the fact upon which the case depended; for had it not attached, the whole reasoning would have fallen to the ground. The argument for the plaintiff is not set out, and this may have occasioned the mistake.

The next authority is *Taylor v. Lowell*, 8 Mass. 381, which is introduced by the following remark: "It has, however, been distinctly held in Massachusetts, New York and South Carolina, that a temporary non-compliance with this implied warranty does not discharge the underwriters from a liability for all subsequent losses, where it distinctly appears that no damage or subsequent change of risk was occasioned by such non-compliance."

This case is somewhat of the same complexion as *Weir v. Aberdeen*, and Judge Phillips fairly states the contradictory complexion of the decree, and for the purpose of reconciling the contradiction, *infers* that it must have been decided upon the doctrine in question.

The ship was insured 12th January, 1798, lost or not lost, at and from Calcutta to her ports of discharge in the United States. The assured had advice of her arrival at Calcutta, in July, 1797, and that she would probably sail from thence in August of that year, and the insurers were so informed. She did sail on the 19th August, for the United States, but leaking badly put back to Calcutta, where she was unladen, made seaworthy, and sailed in February, 1798, from Calcutta to the United States, and arrived at Boston in safety. *Suit was brought for the premium*, and resisted on the ground that the ship sailed in an unseaworthy condition, and that as the risk had therefore never attached, no premium was earned. This was the issue raised, and why the Court undertook in its opinion to go over so much ground it is difficult to understand.

The Court correctly decided or rather exposed, that seaworthiness for the voyage is one thing, seaworthiness for the port another; that accidents chargeable on the underwriters might well happen to a ship or goods in port, and be independent of the forfeiture resulting from subsequent sailing in an unseaworthy condition; that under this doctrine, the policy in question attached, and the premiums were earned, and that the liability to this extent once attaching, was not discharged by the sailing of the ship in an unseaworthy condition, but continued through the voyage, and entitled them to call for payment on a contract of binding force upon the parties on the return of the ship to Boston. This does, it seems to us, reconcile the contradictions otherwise apparent in this opinion, and was in fact all the Court was called upon to decide, the risk attaching but for an instant, the premium was earned, and the case was at an end; and if as Judge Phillips thinks, the Court went further, it was an exposition of law gratuitously given by the Court, and cannot be considered decretal.

The case of *Deblois v. The Ocean Insurance Company*, 16 Pick. 303, is not in point. The risk was at and from Boston to St. Thomas, and a market in the West Indies, &c. The original warranty had been satisfied. The ship arrived at St. Thomas in safety, and it was for a breach of the continuous duty to keep the ship seaworthy imposed by the American doctrine in an intermediate voyage, that was urged as a defence. *Peabody, J.* "But there is another answer: If it were not proper to make the passage without more ballast, yet it was no breach of the implied warranty of seaworthiness, but a neglect to keep her in that state. And if she had been lost in consequence of that neglect, the defendants might have availed themselves of that neglect. But she made the passage in safety. The defect, if any, was cured, for it is not suggested that she was not in good sailing trim when she left the West Indies."

We leave the Court to decide whether this case is not a direct authority for our position, and whether the distinction between the warranties and the consequence resulting from their breach, could be more distinctly pointed out.

The case of the *American Insurance Company v. Ogden*, 15 Wendall 532, 20, 287, is equally inapplicable. It was a time policy for six months. The vessel sailed the 26th November, on a voyage from New York to Charleston, thence to Norfolk, and thence to St. Thomas, in the West Indies. *There was no pretence that the original warranty was broken.* She sailed seaworthily from New York, but in going into Charleston lost her small bower anchor, and failed to replace it; and encountering bad weather, sprung her foremast, and became leaky.

The case of *Chase v. The Eagle Ins. Co.*, 5 Pickering, 52, is still inapplicable. Assumpsit on a policy of insurance upon property on board the *Delia*, at and from New York to Lynn, with liberty to call at Newport. The ship sailed on the 13th or 15th December, from New York, with an underdeck and deck load, and proceeded to Newport, where she arrived the next day, and unloaded her deck load.

We subscribe to every principle advanced in this opinion, but are unable to see in what possible way it can be cited as authority against us. The vessel complied with her warranty, and sailed in a seaworthy condition, and thus the warranty was fulfilled. She went into her port under the permission to do so, and had she been there made unseaworthy by the willful neglect or ignorance of the master, the American doctrine continuing the obligation to maintain her in that condition, would, as the Court has said, have avoided the contract; but the jury found that he had not done this, and the Court sustained the verdict.

McMillan & Ewart v. Union Insurance Company of Charleston, 1838, is extracted from the Charleston Courier, February 26, 1839, we are therefore obliged to take it as it is given in the text, and can only say that if correctly reported, it is in violation of a principle established by the highest authorities in an infinite variety of cases.

Cleveland v. Union Insurance Company, 8 Mass. 308, is the last case cited as illustrating this subject, and proof of the adoption in Massachusetts, New York and South Carolina, that a temporary non-compliance with this implied warranty does not discharge the underwriters from a liability for all subsequent losses, where it distinctly appears that no damage or subsequent change of risk was occasioned by such non-compliance, and we have found it as little applicable to the subject as the rest.

There is no allegation that the ship was unseaworthy at the commencement of the voyage, and the only approximation to the subject is, that it was contended that the neglect of the captain to take his papers with him from the Isle of France. Now admitting this to have been the case, it was still a breach of the continuous obligation to keep the ship in a state of seaworthiness we have so often adverted to, and not that breach of the warranty which is held to be a condition precedent.

The case mentioned by the Court having reference to the needle, we suppose that cited, p. 310, *Stanwood v. Rich*, S. J. S. Mass. Suff. November, 1817, turned altogether upon another point. If Judge Phillips' statement be correct, it was shown by a variety of witnesses, that notwithstanding the utmost care of master and owners, iron-bodies will sometimes occasion a variation, and there being no negligence, the Court did not consider the ship unseaworthy, seeming to acquiesce in the opinion of the witnesses.

We have gone through all the cases cited by Judge Phillips with some degree of minuteness, because we were sensible that it was our duty to rest our objec-

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tion to the decision of the Court on other grounds than our mere assertion that the cases were not in point; we have, we believe, shown that they are not, and we beg to assure the Court that in the analysis of each we have honestly reported them without the slightest endeavor to dress them to our purpose. It may be still as Judge *Phillips* says, a settled rule of American jurisprudence, but it must be shown on other grounds and supported by other authorities than those he has adduced.

We believe that it is not so—that he, like other writers, has been misled by the case of *Weir v. Aberdeen*, and that he has, in endeavoring to find analogous cases, confounded the American doctrine of *continuous* obligation with the initiatory condition to which that case undoubtedly has reference.

The principles established in the case 15 and 20 Wendell, were recently and fully discussed, and resulted in the same decision in *Small v. Gibson*, first tried in B. R., and afterwards in error in the Exchequer Chamber, reported English Law and Equity Reports, vol. 3, and the leading doctrines as we have explained them, are fully recognised as applicable alike to policies for time and voyage, and it seems to us that the Court should pause before it undertakes to overturn a doctrine which has been admitted to be true for centuries, even upon one or two state decisions which may or may not have been properly presented or determined, if such are to be found, and we have found none.

We would, however, again repeat our conviction, that had not the master of the *W. C. Preston*, when he left for the Bay of St. Louis, ordered her to follow him, she never would have left her moorings until his return. We have asked this question of merchants and seamen, and have received the like answer. We repeat that it is impossible to believe that a schooner, navigated by three men and a cook, should, in the absence of her captain, break up from her moorings, and proceed to sea, on her voyage to Galveston; and this is sworn to by the witness, examined under a commission, who says that they did not sail for the Bay of St. Louis, but for Galveston.

The inference is irresistible, that she left her moorings, and went to sea to pick the captain up; and if this be the fact, it is unnecessary to tell the Court that it was a deviation. The master says he boarded the schooner twenty miles from the Bay of St. Louis, and that he was on board when he discovered the loss of the water. This may be, but we do not believe it; and are satisfied, that on the ground of deviation, as well as from the fact that she went to sea in an unseaworthy condition, the underwriters are discharged. Wherefore we pray that the case may be re-argued at bar.

Rehearing refused.

N. B. RIDDLE v. CYRUS RATLIFF et al.

The perfecting of incomplete Spanish titles to land in Louisiana, of right belongs to the legislative branch of the Federal Government, and their power to deal with such titles, in their political capacity, and to determine to whose benefit they should inure, is beyond the control of the Judiciary. In incomplete grants, where the land has been separated from the public domain, the King of Spain had no power, or discretion, which he could lawfully exercise in relation to it, and none passed to the United States. The land was and has remained private property, which no legislation of Congress could affect.

Incomplete titles like settlement and cultivation were mere equities, and the Government had the right to say in what manner they should ripen into perfect titles, and to establish a limit beyond which these equities should cease to have effect. The confirmation was the title, and inured to the benefit of the party to whom it was made. But in cases of complete grants, the confirmation is not the title, but only its recognition, and in ascertaining the rights of parties, it must be laid out of view. Under the Spanish Government verbal sales of lands might perhaps be shown, but only in the case of actual and continued possession by the purchaser.

A PPEAL from the District Court, Seventh District, Parish of West Feliciana. *Sterling, J. U. B. Phillips and H. C. Hudson*, for plaintiff. *Ratliff*, for defendants.

Ross, J. This is a petitory action.

The plaintiff claims title under a complete Spanish grant in favor of *Felix Bernard*, bearing date the 18th of June, 1787.

The sale from the grantee, *Bernard*, to *Zachariah Smith*, under whom the plaintiff alleges he holds, has not been produced, and the sale from *Zachariah Smith* to the next vendee, has not been established by legal evidence. But it is shown that in 1826, the land was confirmed to *John Rhea*, as holder of the Spanish grant, and it is urged in behalf of the plaintiff that the confirmation is evidence of the title being in *Rhea*, and that as the chain of conveyances is complete from *Rhea* down to him, his title is sufficiently proved. The District Court sustained that defence on the authority of the case of *Purvis et als. v. Harmonson et al.*, 4 Ann. 421. The title in that case was an inchoate Spanish grant, which had not divested the former Government of the fee in the land. The conclusion to which we came was that the whole matter of perfecting incomplete titles to land in Louisiana, of right belonged to the Legislative branch of the Federal Government, and that their power to deal with such titles in their political capacity, and to determine to whose benefit they should inure, was beyond the control of the Judiciary.

In this case there was a grantee, and the land had been separated from the public domain before the change of Government. The King of Spain had no power or discretion which he could lawfully exercise in relation to it, and none passed to the United States under the Treaty. It was and has remained private property, which no legislation of Congress can affect. If there had been no confirmation by the United States, the plaintiff would have been required to trace his title to the original grantee, unless he could hold by prescription. The confirmation leaving the title precisely as it was before, and being merely a recognition of it by the United States, it cannot alter the legal rights of parties claiming under or adversely to that title, or change the law of evidence in relation to it.

The distinction between perfect and inchoate titles has been carefully preserved in the Acts passed by Congress for the adjustment of titles and claims to land in Louisiana. The Act of 1805, which those passed subsequently have followed, provides that every person claiming lands by any complete French or Spanish grant, may, and every person claiming under an incomplete French or Spanish grant, or by virtue of settlement and cultivation, shall deliver to the Register of the Land Office a notice in writing, stating the nature and extent of his claim; thus making it optional to apply for the confirmation of complete grants, and recognizing their binding force upon the Government without it. The same section requires parties claiming under complete grants, as well as others to which it refers, to deliver to the Register, to be recorded, the original grant or patent, together with the warrant or order of survey, and the plat. The object of this provision was to ascertain which lands had been separated from the public domain by the former Governments, and no penalty is attached to it; while the Act provides that if any person claiming by virtue of any incomplete French or Spanish grant, or under settlement or cultivation, shall neglect to deliver the notice of his claim, and cause the evidence of it to be recorded in the Register's Office, all his rights shall become void, and forever thereafter be barred, and his title shall not be admitted as evidence in any Court of the United States against a title derived from the United States. Statutes at large, page 826.

Incomplete titles, like settlement and cultivation, were mere equities, and the Government had the right to say in what manner they should ripen into perfect titles, and to establish a limit beyond which those equities should cease to have

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effect. The confirmation was the title, and inured to the benefit of the party to whom it was made. But in cases of complete grants, the confirmation is not the title, and in ascertaining the rights of parties claiming under them, it must be laid out of view.

It has been urged that at the time the sales to *Zachariah Smith* and his brother are alleged to have been executed, verbal sales of land were authorized, and that there is evidence in the record from which verbal sales may be implied. This might perhaps be the case if actual and continued possession by the purchasers had been shown; but in default of possession, the evidence relied on by the plaintiff to support the alleged sales, is not such as a court of justice can act upon.

The plaintiff has failed to make out his case, and the judgment must be in favor of the defendants for that portion of the land claimed beyond the two hundred and thirty-six arpents and two-fifths, covered by *Bernard's* patent. The plaintiff claims under it as far as the back lines of the tracts fronting on the Mississippi River; but he has failed to show the existence and position of that line at the time the patent issued, while it is proven by the defence that the front tracts were not granted for eight or ten years after its date. There was no fixed and known boundary of the front tracts at the date of the grant, by which the quantity it specifies can be controlled. The patent itself is silent in relation to that boundary, and only specifies the front with such a depth between parallel lines as will give two hundred and thirty-six and two-fifths superficial arpents. The defendants are entitled to retain all beyond that quantity.

For the land covered by *Bernard's* patent, we can make no final disposition of the case in favor of the defendants. It is now as it was in the case of *Williams et als. v. Riddell*, an outstanding title, and as such a bar to his recovery. The present defendants in interest were plaintiffs in that case, and had sued *Riddell* for the same lands. *Riddell* set up the outstanding title of *Bernard*. There was judgment for the plaintiffs in the District Court, and they caused themselves to be put in possession under it. Upon a devolutive appeal subsequently taken, the judgment was reversed, and *Riddell* ordered to be quieted in his possession to the full extent covered by the outstanding title. Why *Riddell* has not caused the judgment to be executed, has not been explained; but his rights are not affected by the delay; no length of time can deprive him of the writ of possession to which the judgment entitles him. This is his only remedy.

It is ordered that the judgment in this case be reversed.

It is further ordered, that for the two hundred and thirty-six arpents and two-fifths, of the land covered by the patent of *Felix Bernard*, there be judgment against the plaintiff as of non-suit.

It is further ordered that the defendants be quieted in their possession and title against the claims and pretensions of the plaintiff, to all the land claimed by him, situated between the prolongation of the side lines of the *Bernard* grant, beyond the extent for which it calls, and the rear line of the grants on the Mississippi River as the said line now exists.

It is further ordered, that the plaintiff pay costs in both Courts.

THE STATE OF LOUISIANA v. CAZEAU & BLANCHARD.

There is no objection to the insertion of several offences of the same nature in an indictment in separate counts, though differing from each other in degree and punishment, when these offences are all felonies.

The right to compel the prosecutor to elect on which charge he will proceed, is confined to cases where the indictment contains charges which are actually distinct, and which grow out of different transactions.

The term felony means a crime of great magnitude, and subject to an infamous punishment—death, or imprisonment at hard labor.

In an indictment against several, where the offence is such that it may have been committed by several—they are not of right entitled to be tried separately—but are to be tried in that manner only when the Court on sufficient cause, may think proper.

The Supreme Court cannot review, in criminal cases, the acts of a Judge of the first instance, resting in his discretion.

In an indictment against several, each defendant is entitled to his peremptory challenge. This is not a right to select, but a right to reject—and no one defendant can complain that jurors not challenged by him, have been challenged by a co-defendant.

The improper reception of parol evidence offered by the State, of the contents of a policy of insurance, is cured by the subsequent introduction of the policy by the defendant.

It is a general rule that whenever the credit of a witness is to be impeached by proof of anything that he has said, declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said, declared, or done that which is intended to be proved, in order that he may have an opportunity of explaining that which is *prima facie* contradictory.

The title of an Act cannot control the plain meaning of the words in the body of the Statute.

A PPEAL from the First District Court of New Orleans, *Larue, J. Soulé & Barton*, for appellant.

The Indictment contains two counts:

1st Count:—For preparing combustibles for setting the building on fire:

2d Count:—For actually setting fire to and burning that building:

In both counts that building is described as being "occupied as a mansion house by the said *Pierre Cazeau*."

ASSIGNMENTS OF ERROR WITH COMMENTS THEREON.

1st Error.—The refusal of the District Judge, either to require the District Attorney to make his election upon which of the two counts the defendant *Cazeau* should be tried, on account of the misjoinder and duplicity of counts, or to quash the whole indictment therefor.

Acts of 28, p. 88.—The 1st section of the Act of February 21, 1828, (under which this indictment was framed,) punishes the *malicious* setting fire to a mansion house, &c., with *death*.

The 2d section of that act punishes the preparing and placing combustibles, with *intent* to set fire to such mansion house, &c., with *imprisonment at hard labor for a term of between 10 and 15 years*.

There are but two classes of crimes at Common Law, which fall within the definition of *felonies*; they are,

1st. All such as are punished *capitally*; or

2d. All which involve "*a forfeiture of lands and goods*," &c. All other offences at Common Law are *misdemeanors* only.

Now in Louisiana we have no criminal offences punished by "*a forfeiture of lands and goods*," and consequently we have no crimes deemed *felonies* at Common Law, except such as are punished by *death*.

It follows, that this indictment charges a *misdemeanor* in the first count, and a *felony* in the second; and the question raised by the rules referred to is, can they be joined?

Avoiding details, we think the negative of this proposition is irrefutably maintained in the references and quotations we now cite:

Arch. Crim. Proceedings, p. 80.—"A defendant ought not to be charged with different *felonies* in different counts; as for instance, *murder* in one count, and a *burglary* in the other; or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another," &c.

8	109
44	324
8	109
46	623
8	109
52	576
52	623
8	109
110	726
111	336
8	109
119	52

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Ibid 61.—“So upon an indictment for robbery, and for an assault *with an intent, &c.*, in *different* counts, the prosecutor must *elect* upon which he will proceed.”

If then distinct felonies cannot be joined in distinct counts, it must be inferred *a fortiori*, that felonies and misdemeanors cannot be joined.

The junction of even mere *misdemeanors* in the same indictment, is specially restricted to the contingency, that each of them demand the same judgment.

3 *Term Rep.* 98, 106, 466. 3d *Maule & Selwyn* 539. 8th *East* 46. 2 *Burr.* 984. 2d *Campbell* 181.—“Indictments for misdemeanors may contain several counts for different offences, PROVIDED THE JUDGMENT UPON EACH BE THE SAME.”

It is seen above, that a count for robbery could not be joined with a count for an assault *with an intent to rob, &c.*; and nothing can be surer in criminal pleadings, than that a count for *murder* may not be joined with one for an *assault with an intent to kill*; and why?

Simply for this:—That when the *whole* offence aimed at, has been *actually committed*, the *intent to commit it*, is thoroughly merged and absorbed in its actual accomplishment, and constitutes therefore, not only a main element of the principal charge, but of the punishment allotted to it.

In the case at bar, the 2d count charged that *Cazeau's* house was *actually set fire to and burnt*, and the verdict responsive to this charge, and convicting him of the fact,—officially informs this Court that the house was thus *set fire to and burnt*.

If *Cazeau* procured and placed the combustibles, &c., and was present at the burning, that made him a *principal* to the arson; and if he procured and placed them, but was not present at the burning, that made him an *accessory before the fact*; and as the Act of March 18, 1818, subjects all accessories of this class to the same penalties denounced against the principals, in neither conjuncture could he have been prosecuted for the *misdemeanor*, when the proofs, if reliable at all, must have merged the *misdemeanor* in the *felony*, and have convicted him of that.

There is an English case most strikingly applicable on this point:

2d. *East Cr. Law* 1081, *Isaac's case*. *John Isaac* was indicted for a *misdemeanor at Common Law*, in setting fire to and burning *the house he himself occupied, &c.*, and it being admitted, that several other persons houses adjoining were also burnt, Mr. Justice *Buller* said:

“If other persons houses were in fact burnt, although the defendant might only have set fire to his own, yet, under these circumstances, the prisoner was guilty, IF AT ALL, of *felony*, the MISDEMEANOR BEING MERGED; and he could not be convicted on this indictment, and therefore directed an acquittal.”

This decision was made in 1799, and of course before the 48d George III. (1803,) which being specially designed for the protection of *Insurance Offices*, made *the burning one's own house, a felony*.

The absurdity of such a junction of counts, was strikingly exemplified in the finding of the jury against the defendant *Blanchard*. The only direct proof of his agency, was that he brought the combustible matters to *Cazeau's* house, and was present and concurring when they were placed and set on fire. If the jury believed the witness, (who was *Hercas*, and acknowledged himself an *accomplice*,) then they should have convicted him as a *principal* in the arson; and if they disbelieved him, they should have acquitted him altogether. This latter alternative they would doubtless have agreed on, had they not found a safety-valve in the first count, to let off and compromise their scruples and differences touching *Blanchard's* guilt or innocence under the second count.

2d *Error*. The Court's refusal to sever *P. Cazeau* from his co-defendants, and award him a separate trial, on the grounds set forth. He charges his co-defendants with a conspiracy to take his life, under the forms of law, for a crime of which they alone are guilty; and with a purpose (as one of the means thereof) of depriving *Cazeau* of his right to “an impartial jury of the vicinage,” by maliciously challenging such jurors as he should accept, and as capriciously accepting such as he (*Cazeau*) should peremptorily challenge.

In most joint prosecutions, as experience attests, no motives exist for severing the trials of co-defendants; and their interests being joint and mutual, no serious difficulties could arise in selecting a jury acceptable to all.

But if their interests conflict, or (what amounts to the same) if the parties think that they do, and they cannot or will not agree in the selection of jurors, what is to be done?

If co-defendants in a *criminal* prosecution must agree in their peremptory challenges, or lose their right to them, as in *civil* cases, nothing could be easier than to impanel a jury for their trial.

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But if *each* citizen has a *right* under the Law and the Constitution to challenge peremptorily twelve of the jury, and an equal right to be tried by such of the jurors upon the list whom the State has not challenged either peremptorily or for cause, then, in the conjuncture just stated, a joint trial is plainly impossible, and the State must sever or not try at all.

But this matter may be more appropriately noticed under the next head:

3d *Error*. The Court's refusal to direct or permit the several jurors to be sworn and impanelled, as set forth in detail in Bill of Exceptions, B.

This paper explicitly shows in detail that no less than twelve jurors, (not one of whom had been challenged by the State, either peremptorily or for cause, and each of whom had been accepted by *Pierre Cazeau*,) were excluded from the pannel by the Court, against his consent, and for the reason that they were peremptorily challenged by his co-defendants *Blanchard* and *Blanc*.

From the same paper it appears, that of these twelve jurors, *Blanchard* challenged five, and *Blanc* seven.

Record p. 15.—Now it appears of Record, that *Blanc* and *Hertais* were discharged from the prosecution at an early stage of the trial, and made witnesses of in behalf of the State, so that the State had the benefit of the seven peremptory challenges of *Blanc*, in addition to its own; and of course *Cazeau* was to that extent prejudiced in making choice of his jury.

Nor was that the worst of it; for as *Blanc* was discharged before the State's testimony was closed, of course his discharge was not the result of any exculpatory testimony of his own, and as we must suppose, that the Attorney for the State was fully aware, of all the proofs he could adduce in the State's behalf, it is a fair inference that the discharge of *Blanc* was a foregone conclusion of the District Attorney before the impanelling of the jury commenced; and if so, must *ab initio* have known that *Blanc* could have no just right whatever to intermeddle with, or to thwart *Cazeau* or *Blanchard* in their efforts or their rights to obtain a jury of their choice.

However this may have been in the case at bar, nothing can be surer than that the State, if armed by the judgment of this Court with the power of linking and holding in the same prosecution and trial, persons hostile and hateful to each other, must reap undue and extraordinary advantages, through their clashings and collisions, in their choice of a jury for their joint trial.

At all events, it is patent upon the record in the case at bar, that *Cazeau* stood in an attitude of distrust and hostility to his co-defendants, and that through their peremptory challenges, added to those of the State, the *prosecution* had an advantage against him, in the choice of a jury of eighteen peremptory challenges, against his twelve, though the Statute restricts the State to six!

A very serious objection to this consolidation of persons in the same trial, where they stand in militant relations to one another, may be exemplified in the delicate and embarrassing attitude in which the respective counsel of the militant co-defendants may be placed.

There are members of the bar (and *Cazeau's* counsel are of them,) who could not be induced by any recompense to prosecute, as private counsel, a citizen upon a charge involving his life.

Now, it was past a doubt that *Cazeau's* house had been actually burnt, and that it had been willfully done by somebody, and as his co-defendants had acknowledged before the Recorder, their agency in the doing of it, it became the very gist of his defence to maintain his own innocence, by devolving the guilt on them. To do this effectually, might require his counsel to join the State in prosecuting his co-defendants for their lives. To do it ineffectually, might subject them to the reproach of doing less than their duty towards their client.

It is not complained of at all, that the District Judge allowed to *each* of the prisoners, his right of peremptory challenge within the limits prescribed by law. These are means provided by law, to secure that "impartial jury" which the Constitution guarantees to every citizen charged with a crime, &c.

But the right of peremptory challenge is not more invaluable to the citizen, or more essential to the securing of that "impartial jury," than the right to be tried by such jurors as he *accepts*, after the State has waived or exhausted its rights of challenge.

Neither the Constitution nor the laws countenance any limit or qualification

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to each citizen's right to be tried by the jurors of his choice, except so far as the State's right of challenge peremptorily, or for cause may interfere therewith. Beyond this, the right of acceptance is as peremptory, as absolute, and as exclusive as the right of challenge itself. Neither the Court, and still less an imputed accomplice, can deprive him of jurors which the State has spared to his choice, and the Constitution and laws have allowed him. If this right of acceptance interferes with a co-defendant's right of challenge, and neither will give way, that only proves that they cannot be rightfully and lawfully prosecuted together, and that the trials must be severed. This is all, but that is indispensable, if each is to be secured in their constitutional and legal rights respectively.

4th Error. The Court's receiving, and refusal to exclude from the jury the testimony of *J. M. Lapeyre*, (the President of the N. O. Insurance Company, a witness in behalf of the State,) to prove that *Cazeau* had insured the property, together with the contents of the policy of insurance, without the production of the original, or a duplicate, or an authentic copy thereof.

The objections taken to this testimony were:

1st. That as the indictment charged no intent to defraud the Insurance Company, the proof was wholly irrelevant to the issue under trial; and if it had been relevant,

2dly. It was but secondary and inferior proof, until the absence of the policy and the official books of the Company had been satisfactorily explained and accounted for.

The principles of law trenched upon in this ruling of the District Court, are too familiar and incontestible to need a special reference to authorities, and we shall cite none.

True, the Judge *a quo* assigns two reasons for this decision, at the foot of the Bill of Exceptions.

The 1st. is: That the testimony was admitted to prove "the malice or ill design of the party, &c."

The reply to this is, that it is no answer at all to the objection that the defrauding the Insurance Company was not charged in the indictment, nor therefore in issue; and if it were, it is no answer at all to the other objection, that it was but secondary testimony.

The 2d. point is, that the policies were *afterwards* introduced by the parties, &c.

The obvious reply to this is, that it is no answer to our objection at all, inasmuch as it is altogether *ex post facto*, a mere after thought, in assigning a reason for making a decision, which had no existence whatever at the time that decision was made. We are constrained to add, that we protested at the time, as we protest now, to the foisting into the record by the arbitrium of the District Court, a mere fact, which, under the limited jurisdiction of this Hon. Court in criminal causes, was a matter wholly *in pais*, unless brought into the record by a Bill of Exceptions.

5th Error. The Court's refusal to admit in evidence the duly authenticated original of the affidavits and testimony taken before the Recorder, of such of the witnesses as had been examined on this trial, together with that of the co-defendant *Blanchard*, as set forth in the Bill of Exceptions, D.

The objects stated for offering these proofs were:

1st. To contradict and discredit such of the witnesses whose testimony had been taken both before the Recorder, and on the trial of the cause, through the discrepancies manifest upon a comparison between them.

2d. To establish through the same proofs, (in connection with that of *Blanchard*,) the existence and character of that conspiracy against *Cazeau*, which had been charged in the rule taken, and the affidavit theretofore made by him.

We think we need cite no authority upon this point.

REFERENCES:

1st Mor. Digt. 362.—As to the Louisiana law of Arson, see Act of May 4th, 1805, sections 3, 6, 33, 48, and Kerr's Exposition.

Ibid. 384.—Act of February 22, 1817, sections 4 and 5.

Ibid. 388.—Act of March 12, 1818, sections 8, 9 and 12.

Acts of 1828, p. 38.—Act of February 21, 1828, sections 1 and 2.

Acts of 1829, p. 164.—Act of 1829, section 1.

DEFINITION OF ARSON AT COMMON LAW.

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4th Black. 220; 8d Chit. Crim. Law, 530, 32, 33; 2d Russ. 422, 25, 32, 4; 2d East Cr. Law, 1014, 15, 22, 3, 5, 6, 81.

Indictments at Common Law and under statute for Arson: 3 Chit. Crim. Law, 535, 6, 7, 8, 9 and 340, 1—*Id.* 468.

As to date of Common Law, see 2d Black. Com., p. 31.

As to the definition of Felonies, see 4 Black. Com., 94 to 96.

Johnson, Attorney General.

Error 1.—There is no law to support this assignment. The preparing combustible materials, and the setting fire, are parts of the same act. The former is included in the latter. A man may be found guilty of manslaughter who is indicted for murder or for assault and battery, though indicted for an assault with the intent to kill; or for an assault with intent to kill, though indicted for an assault with intent to murder. The punishment in all these cases is different, and ranges from death to simple imprisonment or fine; and if a person can be found guilty, under such indictments, of the lesser offence, it certainly can be no objection to an indictment, that, in different counts, it sets out both. What the jury is authorized to find, cannot be wrong in the prosecution to charge: *State v. Stouderman*, 6 An. 286. In the case of *The State v. Crosby et al.*, it was held by this Court that a count for larceny may be joined, in the same indictment, with one for receiving stolen goods; and it is good doctrine in England and the United States, that it is no objection to an indictment that several offences of the same nature, though differing from each other in degree, and varying in punishments, are charged in separate counts: 2 Hale, 173; Chitty C. L. 253; Wharton C. L. 106.

This being the case, there was no ground for the motion to quash the indictment for misjoinder and duplicity of counts, and none, consequently, for that to compel the District Attorney to make his election upon which of the two counts Cazeau should be tried.

The right of election is confined to cases where the indictment contains charges which are *actually distinct*, and which grow out of different transactions. But when several counts are inserted in an indictment for the purpose of meeting the evidence as it may transpire on the trial, the charges being for offences technically of the same nature and substantially the same, the right of election is never allowed: Wharton, 109. To fortify his position, the able and ingenious counsel for Cazeau affirms that, at common law, a joinder of a felony and a misdemeanor, in separate counts of the same indictment, is bad, and then contends that the offence of preparing combustible materials for setting fire to a building, at common law, is a misdemeanor, because not punishable here, or in England, with death. The reason of the English authority was, that in an indictment charging a felony and a misdemeanor, the defendant would be deprived of a copy of the indictment, a special jury, &c. This reason has no force in this country. And in the States it has been generally held that felonies and misdemeanors may be properly joined when relating to the same subject matter: Wharton, 108, and authorities cited. But, preparing combustibles to set fire to a building is punishable with imprisonment at hard labor in the penitentiary, and it has been decided that the term, felony, has no precise meaning in this State, the forfeiture of lands and goods which characterized it in England, having been abolished; and that it is understood to denote a crime of great magnitude, and subject to an infamous punishment—death or imprisonment at hard labor: *State v. Sartigue*, 6 An. 405.

Error 2.—The refusal of the Court to award a separate trial to Cazeau, from his co-defendants, was a matter entirely within the discretion of the Judge before whom the case was tried. He did not think a sufficient showing for a severance had been made, and refused it. No matter of law, from which an appeal lay, was involved in his ruling, any more than if it had been an application for a continuance. This Court will not, therefore, revise the decision of the Court of the first instance touching this point. *State v. Jackson*, 6 An. 593; *State v. Bradley*, 6 Ann. 555.

Error 3.—The counsel for the accused seem to labor under a strange hallucination on the subject of the prisoner's rights. They think he has a right to choose a jury, when, on the contrary, he has only a right to challenge. If the doctrine contended for be true, it would be impossible, in any case admitting of

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peremptory challenges, to try two or more persons at the same time. If one challenges a juror, that juror cannot sit in the trial, and if another has the right to insist that the challenged juror *shall* sit, it is evident that no jury could ever be formed. The truth is, if the District Judge erred at all in this matter, it was in the interpretation he gave the law regulating challenges, which allows "the defendant or defendants twelve peremptory challenges." The words of the law are not clear whether, when several are tried together, the *whole or each* shall be entitled to the twelve. But the Judge, contrary to the former practice of the Court, gave to each twelve challenges. The accused certainly cannot, with grace, complain of this act of favoritism. Acts 1837, 49, 1.

Error 4.—The testimony of Lasseps was to a fact which, in this case, it was competent to prove by oral testimony; but, before the bill of exceptions was submitted to the judge, the prisoner himself had proved the same fact by the production of his policy. It can certainly be no ground of reversing the judgment, that the same fact was proved by both parties, and by each in a different way.

DUNBAR, J. The defendants were jointly indicted on two separate counts—one for maliciously preparing combustible matters with intent to set fire to a building, occupied as a mansion house, and the other for maliciously setting fire to and burning the same building.

The jury found *Blanchard* guilty upon the first count, and *Cazeau* on the second, without capital punishment. The District Judge, in conformity with the verdict, sentenced *Cazeau* to hard labor in the State Penitentiary for life, and *Blanchard* to the same punishment for the term of ten years; from which judgment they have appealed to this Court.

There have been numerous assignments of error made for the defence, which we shall proceed to notice in their order.

First. The refusal of the District Judge to quash the indictment, or to require the District Attorney to make his election upon which of the two counts the defendant *Cazeau* should be tried, because of the misjoinder and duplicity of the counts.

This was only a matter of prudence and discretion which rested with the judge to exercise; for, in point of law, there is no objection to the insertion of several offences of the same nature in an indictment in separate counts, though differing from each other in degree and punishment, when these offences are all felonies. In most of the States it has been held that, even felonies and misdemeanors may be properly joined when relating to the same subject matter. The right to compel the prosecutor to elect on which charge he will proceed, is confined to cases where the indictment contains charges which are actually distinct and which grow out of different transactions. Wharton, Criminal Law, 106, 108, 109; 2 Hale, 173; Chitty's Criminal Law, 1 vol. 253. Both the offences charged in the indictment are felonies. What we understand by the term felony, is a crime of great magnitude and subject to an infamous punishment—death or imprisonment at hard labor in the Penitentiary. *The State v. Paul Lartigue et al*, 6th Ann. 405.

Second. The refusal of the District Judge to award a separate trial to *Cazeau* from his co-defendants.

In an indictment against several, when the offence is such that it may have been committed by several, they are not, of right, entitled to be tried separately, but are to be tried in that manner only, when the Court, on sufficient cause, may think proper. It seems that where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be sound exercise of discretion to grant them separate trials.

Wharton's Criminal Law, 666. We, however, cannot review, in criminal cases, the acts of a Judge of the first instance, resting in his discretion. *State v. Cazeau & Blanchard*, 4 Ann. 439. STATE OF LA.
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Third. That the District Judge did not permit *Cazeau* to accept jurors that were peremptorily challenged by the other defendant.

Under the statute of 1837, twelve peremptory challenges are allowed to the defendant or defendants in all criminal prosecutions in this State for any crime or crimes, the punishment of which may be imprisonment at hard labor for a term of twelve months or more.

It is clear that each defendant has his peremptory challenge. The right of peremptory challenge is not of itself a right to select, but a right to reject jurors, and no one defendant can complain of challenges by a co-defendant. 2 Hale's Pleas of the Crown, 268; *United States v. Marchant*, 12 Wheaton, 480; Wharton's Criminal Law, 666.

Fourth. That the Court received the testimony of the President of the New Orleans Insurance Company, a witness on the part of the State, to prove the contents of a policy of insurance without the production of the original.

It appears from the bill of exceptions, signed by the Judge, that the defendants themselves afterwards introduced the policy itself in evidence, which we think cured any error which might have been committed in the introduction of parole proof of its contents.

Fifth. That the Court refused to admit in evidence the deposition and affidavits of witnesses taken before the recorder or committing magistrate, to contradict and discredit their testimony on the trial before the Court.

This evidence was properly rejected by the Court, upon the ground that the credit of these witnesses could not be thus impeached, because no questions had been asked of them about their depositions or affidavits when on the stand. It is a general rule that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done, in relation to the cause, he is first to be asked, upon cross examination, whether he has said or declared or done, that which is intended to be proved, in order that he may have an opportunity of explaining that which is *prima facie* contradictory. Starkie on Evidence, part 2, p. 146; part 4, p. 1753. Besides this, it is stated in the bill of exceptions by the Judge, that the recorder had not made a full examination of the witnesses before him, but had merely taken down in writing what he conceived to be the substance of their testimony.

Sixth. The defendants, after having established by proof that the State House of Louisiana had been destroyed by fire in January or February, 1828, and that the journals of the Senate and House had been wholly lost or destroyed at the same time, offered the Official Gazette, called the Argus, containing the proceedings of the Senate and House of Representatives of Louisiana, for the purpose of showing that the Act of the 21st February, 1828, entitled an Act to amend the Penal laws of this State was, in its inception in the Senate, entitled an Act to amend the Penal laws of this State relative to the punishment of the crime of Arson. The object of introducing this evidence in behalf of the defendants, was stated to be, for the purpose of showing that the entire and exclusive object of the Act of February 21, 1828, on its introduction and up to the moment that the 3d and 4th sections were added thereto in the House of Representatives, was to change alone the punishment prescribed in the 4th and 5th sections of the Act of February, 1817, entitled "an Act supplementary to

STATE OF LA. an Act entitled an Act for the punishment of crimes and misdemeanors," and
 v.
 CASEAU & BLAN- to leave all else of those sections in full force and effect.
 ORARD.

We do not think the Judge erred in the rejection of this testimony.

The Act of 1828 is in these words: "Whenever a free person shall be convicted of having *maliciously* set fire to a mansion house or other building, or to a vessel or other water craft, the person thus convicted, shall suffer death." The title of this Act cannot control the plain words in the body of the statute, and if the Act of the 21st February, 1828, had passed without any change in its original title, the words in the body of the statute are too plain to admit of doubt. In the case of the *United States v. Fisher et al*, assignees of *Blight*, 2 Oranch. 858, Chief Justice *Marshall* said: "On the influence which the title ought to have, in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an Act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. When the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." In the Act under consideration there is no ambiguity.

Seventh. That the Court charged the jury "that when the Court charged specifically as to what the law was, they were bound implicitly thereby, and to receive, construe and to apply the law, as they were instructed by the Court."

We do not consider ourselves called upon in the present case to decide upon this highly important question, as the defendants do not complain of any instructions that were given to the jury by the District Judge upon any questions of law. If, therefore, the Judge erred on this point, it could not have caused any injury to the defendants. See the case of the *State v. Brette*, 6th Ann. 658.

Eighth. That the District Judge refused to charge the Jury, that if they believed, from the evidence, that the mansion house, mentioned in the indictment, and the other property, described by the witnesses as having been consumed at the fire, was the *bona fide* and lawful property of *Caseau* himself, and that he was in the rightful and exclusive possession and occupancy of the same, at the time that the fire took place, and that no house or building of another had been burned or set on fire, or was designed to have been burned or set on fire by the said *Caseau*—that then, under the laws of Louisiana, he is not liable to conviction upon either count of the indictment.

From the opinion we have just expressed upon the plain words and meaning of the Act of the 21st February, 1828, entitled, an Act to amend the penal laws of this State, we can have no hesitation in saying that the District Judge did not err in refusing to give the instruction asked for.

Under the Act of the 22d February, 1817, it was provided: That if any person or persons shall willfully and maliciously set fire to, or burn any dwelling house or other building of *another*, the offender or offenders, on conviction, should be sentenced to an imprisonment at hard labor. See *Moreau's Digest*, 1st vol. p. 384. But the Act of 1828, which we have already quoted, extends the crime of Arson to the *malicious* setting fire to a mansion house, or other building, even if it should be the property of the person who commits the offence, and increases the punishment to death, which is mitigated, however, by a

subsequent law, that permits the jury to bring in a verdict of guilty, without capital punishment, and the Judge to pass sentence of imprisonment for life. We have no doubt about the intention of the Legislature, or the proper construction of this law of 1828.

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CARREAU & BLANCHARD.

It is, therefore, ordered and decreed, that the judgments of the District Court against the defendants be affirmed, with costs.

JOHN L. LOBDELL v. THE UNION BANK OF LOUISIANA AND JOHN L. LEWIS, Sheriff.

Plaintiff made opposition to the sale of two slaves, seized by *Lewis*, Sheriff, in the suit of the *Union Bank v. Hereford*, in the District Court of East Baton Rouge, in which Court he claimed damages against the defendants—alleging the slaves to be his property. Defendants excepted to the jurisdiction, on the ground that their domicile was in New Orleans.

By the Court. The plaintiff's claiming title to the slaves seized, the opposition was properly made by petition to the Court from which the order issued, as required by Article 896, of the Code of Practice; and Article 400, of the same Code, expressly provides, that if the sale has not been enjoined, the opposition shall not prevent the Sheriff from selling the property under seizure, but in such case he shall be personally responsible for all damages which the sale may occasion the intervening party, and the Sheriff shall have his recourse against the party who has obtained the seizure.

When the Sheriff sells property, to the sale of which opposition has been made, the opponent can recover the property from the purchaser. His claim against the Sheriff is for the damages which the sale may have occasioned him—not for the value of the property sold.

A PPEAL from the District Court, Sixth District, Parish of East Baton Rouge. *Robertson, J.*

The above statement of facts is taken from the opinion of the Court. The suit was commenced by petition. In the suit of the *Union Bank v. Hereford and wife*, in which the seizure was made, no opposition was made by the plaintiff. In this suit an Injunction was prayed for but not ordered.

Lobdell, in *propria persona*, and *Beale*, were counsel of record in the District Court, for the plaintiff. No counsel seems to have appeared for the plaintiff in the Supreme Court. *Denis*, for the defendant and appellant.

Had the Bank the right to seize slaves mortgaged to them by *Charles M. H. Myott* anterior to the year 1839, as they have done, is the only question on the merits of this litigation.

The plaintiff, *John Lobdell*, alleges that these slaves are his property and have been in his possession for many years. He complains of the seizure and claims damages from the Bank and from *John L. Lewis*, the Sheriff. He has not thought fit to file a third opposition in the suit of the *Bank v. Hereford*, but for reasons best known to himself, he has preferred to bring an original and direct action in damages against the Bank and the Sheriff. He was at liberty to do so, but what he had no right to do, I believe, was to bring his suit against the Bank, out of the jurisdiction of the Parish of Orleans, where is by law and in fact, located the said Bank's principal establishment.

A special exception to the jurisdiction of the Sixth District Court for the parish of East Baton Rouge, was filed by the Bank and by *Lewis*, Sheriff of the parish of Orleans.

These exceptions were over-ruled by the District Court. It is a difficult matter to understand, on this point, the reasoning of the Sixth District Judge.

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I will, therefore, not attempt to combat it. I will merely state, that according to the well known rule of our law, every one must be sued in the place of his domicile or residence; a corporation has a domicile as well as an individual, and the petitioner has taken the trouble himself, in his petition, to inform the Court that the Union Bank is located in the city of New Orleans, and that *John L. Lewis* is the Sheriff of the city and parish of New Orleans.

There are some few cases specified by law, in which, contrary to the general rule, persons can be sued out of their domicile, but the present case is not one of them.

It is clear that the Sheriff of the parish of Orleans is the officer of all the Courts of the State of Louisiana, and when ordered to execute an order from a District Court, he is amenable before that Court, by rule taken in the suit, in which the order issued, for not proceeding or for proceeding wrong. But if the party aggrieved does not choose to proceed against him, in the suit, out of which the order issued, and prefers to bring an original action in damages against him for his acts, then the original suit ought to be brought at the domicile of the defendant.

The same rule will apply to the Bank, certainly after it has caused to be issued, the order of seizure in the case of the *Bank v. Hereford*, and the two slaves *John Curry* and *Tom Hall* had been seized, *Lobdell* might have formed his third opposition in said suit, to establish his title to the slaves, and then compel the Bank to join issue with him according to Art. 398 of the Code of Practice, but no where do we see that a third opponent has any other right but to establish his title to the thing seized, or his better right to be paid out of the proceeds of the thing sold. If he wants anything else, he must proceed as any other suitor in law.

C. P. Art. 399 provides that at the request of the third opponent the Court may enjoin the Sheriff not to proceed to sell the property thus claimed, provided such third person give security to be responsible for all damages, &c.

Art. 400 says "that if the third person who has *intervened in the suit* (always contemplating that the intervention of the third opponent must be in the original suit, and not a separate suit) has not enjoined the sale of the property of which he claims the ownership, or has failed to furnish the surety required, his opposition shall not prevent the Sheriff from selling the property under seizure, but in such case the Sheriff shall be *personally responsible* for all damages which the sale may occasion to the intervening party, and the Sheriff shall have his recourse against the party who has obtained the order of seizure. If the opposition be sustained, the sale made by the Sheriff shall be null."

This means, in my humble opinion, that if security has not been given, and no injunction has issued, the Sheriff is not before the Court; he is no longer to be dealt with as Sheriff. He is personally responsible; it becomes, on his part, a personal debt; he must be sued in damages. Where? Certainly, as every other person, at his domicile.

The whole tenor of the section treating of the third opposition, in the Code of Practice, indicates that such opposition must be filed in an original suit, and is not of itself an original suit.

Art. 345 says, that "this opposition is a demand brought by a third person not originally a party in the suit," but who, of course becomes a party by his opposition.

Finally, if an opposition, a *tierce opposition*, is filed, it must be in the original suit. That opposition can only be for the causes specified in the Code of Practice. If the party seeks damages, or any other remedy, he must then sue by an ordinary action, at the domicile of the defendant.

I believe the Court will feel no hesitation in reversing the judgment of the District Court, and in dismissing the case for want of jurisdiction in the Sixth District Court.

If, however, it be otherwise, the case is not a doubtful one, on the merits.

In the case of *Skillman v. Purnell et al*, 3 Louisiana Reports, p. 495, Judge Porter says: "The Code of Practice, which gives the right to third parties to oppose an execution, limits that right to those cases where the person making the opposition is the owner of the thing, or has a privilege on it. All other rights, if any such there be, which the party may possess, must be exercised by an ordinary action. They furnish no ground for this mode of relief."

ROST, J.* (SLIDELL, J., dissenting.) The plaintiff made opposition to the sale of two slaves, seized in his possession under an order of seizure and sale, at the suit of the *Union Bank v. Hereford and wife*, on the ground that they were his property, and that the Bank has no right thus to proceed against them, he claims from the Sheriff and the Bank the damages sustained by reason of the wrongful seizure.

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UNION BANK.

The defendants excepted to the jurisdiction of the Court of the parish of East Baton Rouge, on the ground that, although the writ issued from that Court, it was directed to *John L. Lewis*, the Sheriff of the parish of Orleans, who executed it, and any claim for damages against him must be brought in the Court where he exercised his functions.

We are of opinion that there is no error in the decree over-ruling the exception. The plaintiff claiming title to the slaves seized, the opposition was properly made by petition to the Court from which the order issued, as required by Article 398 of the Code of Practice; and Article 400 of the same Code expressly provides that, if the sale has not been enjoined, the opposition shall not prevent the Sheriff from selling the property under seizure, but in such case he shall be personally responsible for all damages which the sale may occasion the intervening party, and the Sheriff shall have his recourse against the party who has obtained the order of seizure.

The sale not having been enjoined, the slaves seized were sold, and the right of the defendant to recover damages from the Sheriff in this suit, if the seizure was unlawful, rests on that express provision of law.

On the merits, the order of seizure issued on two mortgages of *Farrot & Joyce*, in favor of the *Union Bank*, and an act of mortgage by *Hereford and wife*, also to the *Union Bank*, containing an assumption of the mortgage of *Farrot & Joyce*, and also of a mortgage consented by *Charles H. Miot* in favor of the same institution.

The slaves seized in this case are found in none of the acts of mortgage upon which the order of seizure was granted. They are stated to be two of the slaves originally mortgaged by *Miot*; but there is no certified copy of that mortgage in the record, and its existence is denied by the plaintiff. Considering, as urged in behalf of the defence, that there are facts and admissions in the record from which its existence may be implied, there is nothing to show that it was authentic and had been properly recorded, and until that showing was made, the Bank could not proceed by the *via executiva*, and the order of seizure and sale was unadvisedly granted without it.

As to the remedy of the plaintiff, Article 400 of the Code of Practice, already cited, provides that if the opposition be sustained, the sale made by the Sheriff shall be null. The law considers all purchasers as affected with notice of the opposition, and the only right it gives to the party making it, besides that of being indemnified for the damages which the sale may have occasioned him, is to be restored to the possession of the property, as if no sale had taken place. The value of the property sold forms no part of the damages for which the Sheriff is liable, and the judgment condemning him to pay that value is erroneous.

The plaintiff not having asked to be restored to the possession of the slaves, we can make no final decree on this part of the case.

* Ezzm, C. J., recused himself, being a stockholder in the Union Bank.

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The slaves seized were taken from the plaintiff on the 16th May, 1851, nearly two years ago, and are shown by the evidence to be valuable men. Taking into consideration this and other facts in the record, we do not consider the allowance of \$400 damages, made by the District Court, as being excessive.

It is ordered, that the judgment in this case be reversed. It is further ordered, that the plaintiff recover from the Sheriff, *John L. Lewis*, the sum of \$400 and the costs of the District Court.

It is further ordered, that *John L. Lewis* recover from the Union Bank of Louisiana the sum of \$400 and the costs of the District Court.

It is further ordered, that the plaintiff pay the costs of this appeal, and that his right to recover the slaves *Tom Hall* and *John Currey* be reserved.

WRIGHT, WILLIAMS & Co. v. McFALL et al.

Where the first and second of a bill of exchange were both accepted, with the knowledge and consent of the drawers, and without fraud or collusion between the holders and acceptors, the drawers will be bound on both.

APPEAL from the District Court, Tenth District, *Perkins, jr. J. Dubose*, for plaintiffs. *Clark and Short & Parham*, for defendants and appellants.

DUNBAR, J. The defendants being sued on their accepted bill of exchange, duly protested for non-payment, resist its recovery on the ground that they had paid the second bill of the same set to another party after it had been also protested.

There was judgment in the Court below in favor of the plaintiffs, and the defendants have appealed.

It appears that the defendants drew two bills of exchange, being a first and second, payable eight months thereafter, to the order of one of the defendants, who was a member of their commercial house; that the latter endorsed them, and that they were both accepted by *G. Burke & Co.*, the drawers, that they were left with them and were both subsequently negotiated and fell into the hands of third persons, *bona fide* holders. The defendants, in their account with the acceptors, received credit for the proceeds of the two acceptances before their maturity. Both acceptances were protested at maturity, but the second bill was paid by the acceptors after their failure, and the first bill forms the subject of the present suit.

We do not understand that it is usual to accept more than one of the same set of exchange; but if such a course be pursued, as was done in the present case, with the knowledge and consent of the defendants, without any fraud or collusion shown between the holders and acceptors, the drawers who have received the proceeds or who have otherwise authorized the negotiation of the bills must be held bound on both of them. However unusual or irregular the transaction, they cannot visit with loss this irregularity upon third persons acting in good faith.

The judgment of the District Court is, therefore, affirmed, with costs.

WILLIAM ADAMS v. ROUTH AND DORSEY.

Where, in a judgment rendered, the amount is left in blank in the record, the appeal will be dismissed.

A testator can leave to his concubine only movables to the value of one-tenth of his estate.

An heir cannot contest the validity of a legacy, when sufficient remains, after payment of the legacy, to pay him the full amount of his interest in the succession.

APPEAL from the District Court, Tenth District, *Perkins, jr., J.*

Stacy & Sparrow, for plaintiff. The emancipation of a slave is the donation of an immovable. *Prudence v. Berudi*, 1 Lou. R. 241. A concubine can only take a tenth of the estate, C. C. 1468; 6 Lou. R. 387. "Illegitimate, colored bastards are not permitted to prove their paternal descent, but it may be proved against them." C. 226; *Jung v. Doricourt*, 4 Lou. 177; *Robinnet v. Verdan*, 14 Lou. 544; *Compton v. Prescott*, 12 Rob. 71.

Shaw, for defendants. The emancipation of a slave is the donation of his value. 1 Lou. 241.

Rost, J. This is an appeal by *John Routh* and *Samuel W. Dorsey*, executors of *Wm. Adams, jr.*, from so much of the judgment, rendered in this case, as annuls and declares void the provision in the will of *Adams* emancipating the slave *Nancy*, and bequeathing her a sum of money, the watch and furniture of the testator. *John Routh* has also appealed from a judgment rendered against him individually, but as the amount for which the judgment was rendered, is left in blank in the record, and we have no means of supplying the defect, that portion of the appeal must be dismissed.

The plaintiff and appellee has prayed that the judgment be amended in his favor, by setting aside two legacies of \$1000 each to two bastard children of the testator, which the District Court has allowed, on the ground, that the legatees had not been legally emancipated, and if they had been, that the acknowledgment of the father in the will is insufficient to give them capacity to take the legacy.

The right of the plaintiff to oppose the emancipation of the slave *Nancy* is undeniable. He is the forced heir of the one undivided fourth of his son's estate, this slave included; and may, as such, contest the validity of the testamentary disposition under which she claims her freedom.

It is proved that the testator had lived in open concubinage with this woman, and under the disposition of Article 1468, he could only give her movables equal in value to one tenth part of his estate. Admitting that the emancipating a slave by will should, in favor of liberty, be considered not as the donation of an immovable, but as a donation to the slave of his own value, yet that value must not exceed the disposable portion. *Nancy* is valued in the inventory at \$1000, and the property which legally belonged to the testator, without including her, at \$4750. The disposition is, therefore, excessive, and as it cannot be reduced, the District Judge properly set it aside.

The appellee is entitled to receive one-fourth of the entire succession of the testator, and to enforce a partition of it in kind or by licitation, as the case may be; but as after he has received his share sufficient assets will remain in the hands of the executors to pay the legacy of \$1000 to each of the children of the testator, he has no interest or standing in Court to contest the validity of

ADAMS those legacies; and as the residuary legatees have not prosecuted their appeal
 v. ROUTH & DORSEY. from the judgment, it must remain undisturbed.

It is ordered, that the appeal of *John Routh* individually be dismissed.

It is further ordered, that the judgment be otherwise affirmed, with costs.

SUCCESSION OF ELIHU CRESSWELL.

It clearly results from the will of *Cresswell* that, in the absence of his universal legatee, the testator intended to give his executor the seizin of all his property.

The statute of 1837 is highly penal, and when, under it, an executor is dismissed, and compelled to pay 20 per cent, he will not be deprived of his commissions.

APPPEAL from the Fourth District Court of New Orleans. *Wolfe & Singleton*, for the executor and appellant. *Rozier*, for the opponent and universal legatee.

ELIHU CRESSWELL'S WILL.

State of Louisiana, City of New Orleans. Whereas the uncertainty of life is great, and is not left to the time and choice of human beings, I do herein declare this to be my last will and testament. I do herein will the freedom of my man servant Gabriel, whom I acquired by inheritance from my father's estate, and the sum of fifty dollars to him for long and faithful services, that he may acquire his freedom in the slave States, or be sent to the free United States of America, as he may desire.

And I do moreover hereby will and decree the freedom of all slaves that may belong to me at the time of my death, and that the slaves shall be sent to one of the free States of the United States of America, and there liberated: and their names shall be registered in the Court as free persons, no longer to be held in bondage; and I wish the expense of such removal to be paid, first out of any moneys or assets that may belong to me, and in case there is no assets, that the slaves shall work at wages until a sufficiency is obtained to remove them as above directed.

My executors shall appoint some trustworthy man to attend the removal of the slaves, who shall receive the expenses and a just compensation for the removal of the slaves to the free States.

And I further will and bequeath all the remaining of my estate to *Mrs. Sarah Cresswell*, my beloved mother, and in case of her death, to the heirs of her body. And I do wish that my friends, *John E. Colwell*, (*Caldwell*), of the firm of *Edgill, Mulford & Co.*, and *Mr. L. E. Simons*, attorney at law, both of this city, shall act as executors to carry out this my last will and testament.

I would will my body to a respectful burial. My soul belongs to the Supreme Being, and I with pleasure submit to his will.

I have written this will and testament in a state of sound mind, and hope no mortal man will interfere with it.

This done this second October, 1848.

ELIHU CRESSWELL.

ROSE, J. The appeal in relation to the claim, made in behalf of the slaves of the testator in this case, for the wages earned by them since his death, has been discontinued and the claim waived.

There is no error in the allowances made by the District Judge for counsel fees and executors commissions. We concur in his opinion that there was no necessity for employing two counsel, and we consider the compensation allowed a fair remuneration for the services rendered.

We think it clearly results from the will, that in the absence of his universal legatee, the testator intended to give his executor the seizin of all his property. It is contended that he forfeited his commissions, because he did not keep the

funds of the succession in Bank, as required by the Act of 1837. He was dismissed by the Court on that ground—was made to pay 20 per cent. interest on the funds of the succession in his hands, and would have been adjudged to pay special damages, if any had been proved. The statute of 1837 is highly penal, and there is no warrant of law for increasing the penalties it imposes, and depriving executors of their commissions under it. As, however, the executor was dismissed through his own fault, before the succession was fully administered, and any disposition had been made of the testator's slaves, the District Judge very properly refused to allow the commission on their appraised value. Whether the new executor will be entitled to receive it, in case the slaves are sent out of the State, if the heirs object, is a question not before us.

It is ordered, that the judgment, so far as it reduces the counsel fees paid by the executor from \$2000 00 to \$1200 00 and the executors commissions from \$1633 15 to \$785 65, be affirmed, with costs.

SAME CASE ON A RE-HEARING.

ROST, J. We have been asked to change the judgment rendered in this case yesterday, by entering a decree affirming the judgment of the District Court generally. In doing so we wish to observe, that the decree simply orders the old executor to account to the new one for the wages earned by the slaves since the death of the testator, and does not decide to whom these wages belong, and that the affirmation of the judgment leaves that question open.

It is ordered, that the judgment rendered in this case, on the 18th instant, be changed so as to read as follows:

It is ordered, that the judgment of the District Court be affirmed, with costs.

JOHN H. A. FROST v. GEORGE HARRISON, tutor. JOS. CARMENA,
Warrantor.*

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A promise to pay may, in the absence of any contradictory circumstances, be taken as sufficient *prima facie* evidence of a regular presentment and notice.

APPPEAL from the District Court, Seventh District, *Sterling, J. U. B. & E. Phillips*, for plaintiff. *Brewer & Collins*, for defendant. *Ratliff*, for warrantor.

SLIDELL, J. This is an action to recover of the testamentary heirs of *John C. Morris* the balance due on a bill of exchange, drawn by *C. McDermott* on *J. H. Leverich & Co.*, to the order of and endorsed by *J. C. Morris*.

There was judgment for the plaintiff in the Court below, and the defendant has appealed.

It does not appear whether the bill was or was not duly presented at maturity to the drawees. But it is proved that about three months after its maturity,

* *Carmena* was called in warranty, on the ground that he had guaranteed the payment of the note. He excepted, alleging that he was no party to the note sued on.

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the drawees, being then partially in funds of the drawer, paid the plaintiff \$348 94 on account, and that subsequently *Morris* made a settlement of his accounts with *Frost*, and promised to pay the balance. If it were shown affirmatively that there had been *laches* on the part of the holders in not presenting the bill for payment to the drawees, and so *Morris* had been discharged, his subsequent promise, made in ignorance of such discharge, might not bind him. But without any proof of such *laches*, we are permitted to infer an existing obligation to pay, moving and supporting the promise, and must hold the defendant to it. Or to state the legal result in other words, a promise to pay may, in the absence of any contradictory circumstances, be taken as sufficient *prima facie* evidence of a regular presentment and notice. See 7 Annual, p. —.

We think the Court did not err in dismissing the call in warranty. There was no privity of contract between *Carmena* and *Morris*.

Judgment affirmed, with costs.

Re-hearing refused.

RICHARD CLAMPITT v. A. G. NEWPORT.

Suit on a promissory note payable to *Richard Clampitt*, administrator, &c. Held: *Clampitt* might sue in his individual name.

An attachment suit in Mississippi, where nothing is shown to have been made, is no bar to a personal action here.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Stirling, J. Bowman & DeLee*, and *E. T. Merrick*, for plaintiff. *Muse & Hardee*, for defendant and appellant.

SLIDELL, J. The plaintiff, in his individual name, brought suit against *Newport* on the 6th January, 1851, upon an instrument of the following tenor:

\$1120.

WOODVILLE, January 6, 1844.

Twelve months after date we, or either of us, promise to pay *Richard Clampitt*, administrator *de bonis non*, with the will annexed, of *Jacob Elsberry*, dec'd, eleven hundred and twenty dollars, for value received.

A. R. BROWN,
A. C. NEWPORT,
M. C. GAULDEN.

The defendant excepted to the right of *Clampitt* to sue upon this instrument in his individual name. The exception was disregarded by the District Judge. His opinion is sustained by the cases of *Urquhart et al v. Taylor*, 5 Martin, 202, and *Gilman v. Horsley*, 5 New Series, 662. It is proper to add, that no set off is proved against *Clampitt*, either individually or officially.

Under our law this instrument, not being negotiable in its form, is subject to the prescription of ten years.

The law of Mississippi is not shown, and, therefore, no foundation is laid for any discussion of it.

The defendant pleaded that he was entitled to a credit for an amount made by plaintiff, under process in Mississippi. He has not averred or proved any specific amount so made.

CLAMPTT
v.
NEWPORT.

Brown was cited in warranty as the principal of *Newport*, in the debt in question. He did not deny the existence of the relation of principal and surety. He relied upon an exception to the plaintiff's right to sue, which we have already noticed. He also contended the suit could not be maintained, in consequence of the attachment proceeding in Mississippi. There is no evidence that any thing was made in that suit, and the mere existence of such proceedings in that State, is not, in our opinion, a bar to a personal action here by the plaintiff against *Newport*, nor a defence against *Newport's* recourse to his principal.

Judgment affirmed, with costs.

NEHEMIAH MAGEE v. JAMES DUNCAN.

Case remanded because of *ex parte* amendment of Sheriff's return.

APPEAL from the District Court, Eighth District, Penn, J. *Halcy*, for defendant and appellant.

SLIDELL, J. From a judgment against him the defendant has appealed, and assigns various errors as apparent on the face of the record.

Two of the assignments require no other notice than the remark, that the appeal comes up without all the evidence, and they fall within the operation of the well settled rule, that nothing which may have been cured by legal evidence in the Court below can be assigned as error, when the appeal comes up without all the evidence.

But the other matter of error assigned is more serious. The judgment in this case was rendered upon default. The return of citation, exhibited by the transcript, is defective. The judgment by default was taken on the 15th October, 1850, and was confirmed on the 19th. In May, 1851, the defendant prayed for and obtained an order of appeal, returnable in February, 1852. In February, 1852, the transcript was filed and the appellant seasonably filed his assignment of errors, upon the ground of the insufficiency of the return of citation. In February, 1853, the cause having been continued, the plaintiff filed a supplemental transcript, whereby it appears that in November, 1852, he obtained *ex parte* leave to the sheriff to amend his return, and accordingly the sheriff did amend his return, and it now appears as a return filed 7th October, 1850.

This is an unusual condition of the record, and we consider it unjust to hold the appellant by this *ex parte* amendment. On the other hand, if the citation &c., were really served, as the amended return states, the defendant, it seems, would have no equitable right to set the judgment aside.

We will save the rights of both parties by remanding the case with instructions.

It is, therefore, decreed, that the costs of this appeal be paid by the plaintiff, and that this cause be remanded, with the instructions to the District Judge, to require a rule to be taken by the plaintiff upon the defendant, whether the facts stated in the amended return are true, and thereupon to set aside the judgment of 19th October, 1850, or maintain the same as the truth may appear; and that, until said rule be heard and finally disposed of, no further execution of said judgment be had.

D. F. JOHNSON v. JOHN B. WELD.

Plaintiff claims from defendant a slave, through his wife, sole heir of *Frederic Christian*. Defendant sets up title through *his* wife, niece of *Christian*—to whom, he alleges, *Christian* donated the slave—and he pleads *res judicata*. In Tennessee one *Wheaton* had the slave in possession, and *Weld* the present defendant, brought an action of *replevin* for the slave. *Wheaton* had hired the slave from *Christian's* executor. *Weld* bonded the slave, and took him into possession. The executor of *Christian* then brought an action of *replevin* against *Weld*, and by legal process obtained possession of the slave, and returned him to the possession of *Wheaton*.* The matter at issue between the parties was, whether the slave had been given by *Christian*, during his life, to *Weld's* wife.

Held: In Tennessee slaves are personal property, and can only be claimed from the executor. The proper party in interest in Tennessee was, substantially, the party litigant in relation to the title of the slave—and the plaintiff in this suit, acquiring title through him (the executor), ought to be bound by a judgment rendered against the executor as owner. Throughout these proceedings in Tennessee, the executor was a privy to *Wheaton*, he being a mere baillee and nominal party. This privy in estate binds the party by the judgment as effectually as if he had been a technical party to the record.

The article 2265 of the Code, and others of the same section, must not be considered as a strict, arbitrary and technical enactment, but as one declaratory of the conditions of the *res judicata* as a principle of jurisprudence.

These conditions of the *res judicata*, established in order to ensure the ends of justice, have been received in the jurisprudence of the civil law in the light most favorable to attain them. The effect of the *res judicata* is, consequently, held to extend to the successors of the *ayans cause*, the assignees of the parties and to all those who claim through them.

A PPEAL from the Second District Court of New Orleans, *Lea, J. Elmore & King*, for plaintiff, cited Code, 2265.

Hamner, for defendant—cited 8 A. 36; *ibid*, 172; 1 Starkie on Evidence, p. 208, 367; 1 Greenleaf, § 522-3, 532-3, 535-6, 189, 180; Bull, N. P, 232; 4 Dall. 120; 2 Doug. 517; 1 Doug. 56; 6 Rand. 865; Vermont, 317; 4 Rawle, 278; 1 How. Miss. 53.

EUSTIS, C. J. The plaintiff sues for the recovery of a slave named *John*, who, he alleges, belongs to him in right of his wife, by virtue of his marriage; she being the sole heir of *Frederic Christian*, deceased, to whom the slave originally belonged. The place of residence and marriage of the parties was in the State of Tennessee.

The defendant claims the slave in the right of his wife, to whom, it is alleged, the slave was given by his master, *Frederic Christian*, in his life time—she having been his niece.

The Judge of the Second District of New Orleans, before whom the case was tried, gave judgment for the plaintiff, and the defendant has appealed.

There was a plea of *res judicata* filed by the defendant, which was overruled. The facts at issue had already been passed upon by a jury of the vicinage, in the State of Tennessee, who found in favor of the present defendant, and it was with evident hesitation that the learned Judge, on a review of the case, came to a different conclusion.

No question is raised as to the right of the plaintiff to maintain this action. The case has been argued on the right of property of the parties respectively, and on the force and effect of the judgment pleaded.

The suit in which the judgment was rendered, was instituted by the present defendant in the Criminal and Commercial Court of Memphis, in the State of

* This latter suit was never tried.

JOHNSON
v.
WELD.

Tennessee, in May, 1847, against *Sterling M. Wheaton*, who had the slave in his possession. The suit was an action of *replevin*, having for its object the restitution of the slave to his proper owner. The jury found that the slave was the property of the plaintiff, and judgment was rendered accordingly for his recovery. After unsuccessful motions on behalf of the defendant, *Wheaton*, for a new trial and in arrest of judgment, an appeal was taken by him to the Supreme Court of Tennessee, which rendered judgment, affirming in all things that of the Court below.

The District Judge considered that the parties litigant were not strictly the same in both suits, and that the plea of *res judicata* was, therefore, not available to the defendant.

The testimony of the witnesses, whose testimony was taken under commissions, who were intimate with the brothers *Christian*, is, in some respects, singularly conflicting. From the respectability of the witnesses, we are induced to believe that the gift of this slave to the defendant's wife, when a child, notwithstanding what was said on the subject and the impressions created thereby, was not of that definite character which transferred the property in the slave. That such was the belief of her father, whose duty it was to protect the interest of his child, as well as to restore the slave if only confided to him by his brother, we think is shown by the fact of the slave having been placed by him on the inventory of his brother's estate. The whole possession, of which the defendant seeks to have the benefit, was in the father, who has, by this fact, recorded his conviction of its origin and character.

We are, therefore, under the necessity of examining the defence resting on the verdict and judgment, which the defendant has pleaded.

We assume the law of the State of Tennessee, on this subject, to be that a verdict and judgment on any matter distinctly put in issue before a Court of competent jurisdiction is conclusive thereof, between the parties and their privies.

The defendant was the plaintiff who recovered judgment, and *Sterling M. Wheaton* was the defendant. *Wheaton* was a nominal party to the record. He had hired the slave from *Mattheus*, who was the executor of *Frederic Christian*. On the institution of the action of *replevin*, the slave was taken from the possession of *Wheaton* and delivered to the plaintiff, *Weld*, on his bond. This took place on the 3d May, 1847. Two days after, the executor of *Frederic Christian* instituted his action of *replevin* against *Weld*, and the slave was taken, by legal process, from the possession of *Weld* and delivered to the executor, who returned him to the possession of *Wheaton*.

Slaves being personal property in Tennessee, it is plain that at this time the title of the slave was in the executor, who had the same property in the slave which the testator had. Accordingly we find the matter in issue between the parties was, and it was so submitted to the jury, whether *Frederic Christian*, in his life time, had given the slave to the wife of the plaintiff, *Weld*, who is the present defendant. This is the matter in controversy in this suit. It is true the parties to the record were not the same. But the parties in interest were the executor and the present defendant, and the present plaintiff claims title through the defendant in that suit.

Mr. Mattheus, the executor, was examined as a witness on the trial in the Court below.

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It appears there were two trials of this cause in the Courts of Tennessee. The judgment on the first was reversed by the Supreme Court. Subsequent to the first trial, the present plaintiff, *Johnson*, had married the daughter and only heir of *Frederic Christian*. On the second trial he was present, but took no part in the business of the trial. He signed the appeal bond of *Wheaton*, and judgment was rendered against him on the appeal, as surety for its prosecution. All the witnesses were summoned by the witness' direction, and, we infer from his testimony and his presence at the trial, that he controlled the management of the cause.

The executor at this time having the administration of the estate, as we understand the decisions of the Courts of Tennessee, the present plaintiff, in the right of his wife, could only claim this slave from the executor, upon whom the law casts the personal estate. It is held by the Supreme Court of that State, that distributees cannot recover their distributive portions without an administration on the estate of their intestate, and a person in possession of an intestate's personal property can hold it against any person but a creditor and an administrator. *Thurman v. Shelton*, 10th Yerger's Reports, 383 ; 2 Blackstone's Com. 496 and 511.

Thus the proper party in interest was substantially the party litigant in relation to the title of the slave, and the plaintiff in this suit acquiring his title through him, ought to be bound by a judgment rendered against him as owner.

We consider the executor, throughout these proceedings in the Courts of Tennessee, as a privy to *Wheaton*, he being a mere bailee and nominal party only. This privity in estate binds the party by the judgment as effectually as if he had been a technical party to the record.

The suit in *replevin*, in which the executor was the plaintiff, does not appear to have been tried, no ulterior proceedings having been had in it.

Such is the result of an examination of this question, according to the laws of Tennessee, where all the parties resided and the slave in dispute lived.

The article 2265, of our Code, is a literal copy of the article 1851 of the Code Napoleon. This article, and the others of the same section, must not be considered as a strict, arbitrary and technical enactment, but as one declaratory of the conditions of the *res judicata* as a principle of jurisprudence. The same provision existed in the laws of the Partidas, and prevails, under the Civil law, as a conservative element in the administration of justice. In a restricted sense it would be inoperative and tend rather to stir up than to terminate litigation. These conditions are *eadem res eadem causa* and *eadem conditio personarum*. The demand must be between the same parties. The article does not say that the parties to the record must be the same, and it becomes a question of jurisprudence as to what constitutes the interest which is considered as identifying parties in one suit with those in another. We know that nothing is more common in mercantile business than to test legal questions, of debt and property, in the names of other parties than those really interested. The factor who deals in his own name with the property of his principal—the consignee, whose action against the carrier is of every day occurrence—the merchant, who insures in his own name the shipment in which, perhaps, he has not the slightest interest, but which has been put entirely under his control—all these parties institute and defend suits for their principals relating to the business under their charge. It cannot be supposed for a moment that their principals, who submit to have their rights tested in this form, are not bound by the adjudications which

they themselves, through their agents, have provoked. As a matter of law, the bare statement of the proposition refutes itself, and as a matter of common justice, it is revolting to our moral sense.

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WALD.

These conditions of the *res judicata*, established in order to ensure the ends of justice, have been viewed, in the jurisprudence of the Civil Law, in the light most favorable to attain it. The effect of the *res judicata* is consequently held to extend to the successors of the *ayans cause*, the assignees of the parties, and to all those who claim through them. In questions relating to the status of persons, to servitudes and indivisible rights, the law, from necessity, has created exceptions to the general rule, where the suit has been publicly tried and the judgment is without collusion.

Toullier, in speaking of the principle that the possessor is presumed to be the owner, says :

"It results from this principle that judgments, rendered without collusion, against the apparent owner, relating to the thing of which he is possessed, acquire the force of *res judicata* against the true owner when he is restored to his rights, as also the judgments in favor of the possessor, relating to the thing, inure to his benefit. It cannot be said that a judgment of this kind is *res inter alios acta*. It is always the same moral person, which passes from one individual to another, as is the case with all those succeeding under a particular title. The true owner must take the consequence of letting his rights remain in the name—*sur la tête*—of another person, who is clothed with the apparent ownership." Toullier, vol. 7, 28.

It is sufficiently evident, says the same author, that the authority of *res judicata* takes effect for and against those who, without being personally parties to the judgment, are represented by a mandatory, or attorney in fact, by their tutors, curators, &c. In all these cases there is a moral identity of the parties. Vol. 10, 198.

There may be a physical difference of parties to suits, but at the same time a legal identity. If, without figuring as a party to the record, I am represented by a party to it, the law considers both as one person, and the judgment rendered is obligatory on both. Marcadé on Article 1851, vol. 5, p. 190, 191. See also Pothier, *Obligations*, 900; also Zachariæ, vol. 5, p. 767.

The Court of Cassation has always determined cases in which the plea of *res judicata* has arisen, in the sense of these authors. Indeed, any other doctrine would render litigation interminable.

If then the executor was the proper party in interest in this suit, the circumstance of its having been conducted in the name of his baillee, *Wheaton*, would not prevent the judgment from having the effect of *res judicata* as to his rights. The plaintiff, claiming through him, has no greater right than he had.

By an agreement of counsel, the plea of *res judicata* was tried under the general issue, and the District Judge decided thereon as we have stated.

If this verdict and judgment of the Court of Tennessee bound the parties there, it ought to be obligatory on them everywhere.

I have always understood it to be clear law, says *Lord Kenyon*, in the case of *Ogden & Folliot*, that all judicial acts done in one country over the property of the subjects within their jurisdiction, are conclusive on the property of the parties in another country. 8 Durnford & East, 407.

Whether the laws of Tennessee, or those of Louisiana, are considered as

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regulating the rights of the parties to this suit, the case is with the defendant, and judgment must be rendered accordingly.

It is, therefore, considered by the Court, that the judgment of the District Court be reversed, and judgment be rendered for the defendant, with costs in both Courts.

NATHAN GILBERT v. J. H. PALMER.

Where the declarations of the defendant concerning the plaintiff appear to have been uttered without malice, and under circumstances from which no malice is in law implied, they carry with them no pecuniary responsibility.

APPEAL from the First District Court of New Orleans, *Larue, J. Bonford & Finney*, for plaintiff. *Benjamin & Micou*, for defendant and appellant.

ECSTIS, C. J. This is an action for damages for slanderous words, uttered by the defendant, concerning the plaintiff. The District Judge gave judgment for the sum of three hundred dollars against the defendant. The defendant has appealed. The plaintiff has asked for an increase of damages on the appeal.

The District Judge thought the injury done to the plaintiff, by the charges of the defendant, was but trifling; but thought they were made for the sole purpose of injuring him.

We have not been able to concur with the District Judge in this latter conclusion. The declarations of the defendant, concerning the plaintiff, appear to have been uttered without malice, and under circumstances from which no malice is in law implied, or which carry with them any pecuniary responsibility to the plaintiff.

The judgment of the District Court is, therefore, reversed, and judgment rendered for the defendant, with costs in both Courts.

ORIN BEEBE, adm., v. JAMES McNEILL and another.

When a party sues upon a note that has been destroyed, it is not necessary to allege or prove that the destruction was advertised.

APPEAL from the District Court, Tenth District, *Perkins, jr., J. Bonner & Drew*, for plaintiff and appellant.

SLIDELL, J. The plaintiff alleges that the defendants made three notes in favor of *Doan*, of whose estate he is administrator; that they were inventoried as the property of the estate, and came into his possession as administrator; but that afterwards his dwelling house was burned, and the notes, with all the petitioner's papers, were destroyed in the conflagration. He asks judgment for their amount.

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BRASS
v.
McNEILL.

At the trial, the plaintiff offered evidence to prove that the notes had been destroyed by fire after they came into his possession, as administrator, to the admission of which evidence the defendants objected, on the ground that the plaintiff had not alleged nor proved that the destruction of the notes had been advertised; which objection was sustained by the Court, and a bill of exceptions was taken. There was a judgment for the defendant as in case of non-suit, and the plaintiff has appealed.

We think the District Judge erred. The error seems to have arisen from a misapplication of an Article of the Code.

In article 2258 it is said: "When an instrument in writing, containing obligations which the party wishes to enforce, has been lost or destroyed, by accident or force, evidence may be given of its contents, provided the party show the loss, either by direct testimony, or by such circumstances, supported by the oath of the party, as render the loss probable; and in this case the Judge may, if required, order reasonable security to be given to indemnify the party against the appearance of the instrument, in case circumstances render it necessary." The next Article provides that, "in every case, where a lost instrument is made the foundation of a suit or defence, it must appear that the loss has been advertised, within a reasonable time, in a public paper, and proper means taken to recover the possession of the instrument."

The first Article expressly embraces instruments destroyed, as well as those lost. In both cases it was equally necessary that their contents should be proved and their absence accounted for, and it was equally expedient, in each case, to provide a rule of evidence. But where a parity of expedience and necessity does not exist, the Code does not associate them. Where an instrument is alleged to have been lost, the Code requires satisfactory proof that due diligence has been used to find it. One of the means of finding it is to inform the public of its loss, and who is the owner, so that any one into whose possession it has chanced to come may restore it, or any one who has information tending to facilitate its discovery, may communicate it. Again, there is the further motive of putting the community on their guard, especially in the case of commercial paper. These reasons do not apply to a destroyed writing, and it is not easy to imagine how any good could come of advertising its destruction. The Article 2259 speaks only of lost instruments in express terms; and there is no reason of analogy for enlarging its application.

When the Code of 1825 was framed by the juriconsults commissioned for that purpose, they contemplated the preparation of a complete system of evidence, as a separate part of the great legislative work which had been undertaken by the State. They reported only such amendments, on the subject of evidence, as they thought immediately called for, leaving its rules, in other respects, to be meanwhile controlled by the sound discretion of the Courts. See Amendments to the Civil Code, title 3, p. 58.

Judgment reversed and cause remanded for new trial, defendant to pay costs of appeal.

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B. HAYNES, Liquidator, &c. v. S. B. KENT.

The Stockholders of the Clinton and Port Hudson Railroad Company are, in no legal sense, joint debtors of the Corporation. The obligations of each are several, and entirely unconnected with those of the other stockholders.

A stockholder in the Clinton and Port Hudson Railroad Company, who holds the bonds and coupons belonging to the series for which his mortgage is pledged, may plead the same in compensation of his stock subscription.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Stirling, J. Ellis & Merrick*, for plaintiff *Bowman & DeLee*, for defendant and appellant.

ROST, J. The Gas Light and Banking Company discounted two hundred and fifty bonds of \$1000 each, issued by the Clinton and Port Hudson Railroad Company, and received in pledge, as security, the mortgages given by the stockholders of the Company to secure the amounts of their subscription of stock.

The Gas Bank disposed of some of those bonds, and is still the owner of two hundred and twelve of them, a large part of which is overdue.

In conformity with the opinion and decree of this Court, in the case of the *New Orleans Gas Light Company v. Bennett*, 6 Ann'l, 456, that the equities of the creditors of the Company must be worked out through the corporate officers, the Gas Bank instituted proceedings against the plaintiff to compel him, as liquidator of the Company, to make a call upon the stockholders for a sufficient amount to pay the matured bonds for which the stock is primarily liable, and the interest on said bonds. There was judgment for the plaintiff in that suit, and, in execution of it, a call of three-fifths of the amount of the subscription has been made. This action is brought to enforce against the defendant the contribution, due by him, upon fifty-one shares of stock.

The defendant excepted to the petition, on the ground that his obligation to the Company was joint, and no action could be maintained against him unless all the stockholders were made parties to the suit.

There is nothing in this exception, and it was properly over-ruled. The defendant stands as any other partner in a joint stock Company, and is bound to pay, when regularly called upon, the share of the capital which he agreed to furnish. He is, in no legal sense, a joint debtor of the corporation. His obligation, on the contrary, is several and entirely unconnected with those of the other stockholders. He owes the amount of his subscription, whether they pay or not, and nothing beyond that amount can be claimed of him under any circumstances.

On the merits, neither the indebtedness of the Corporation, nor the necessity of the call to meet it, are denied. The only defence set up is, that the defendant is the holder of bonds and coupons of interest, for which his mortgage is pledged, exceeding the entire amount of his subscription, and that he has thus extinguished his liability to the Company. He further avers, that although he did not believe it necessary, for the purpose of avoiding litigation, he made to the plaintiff a tender, under protest, of the bonds and coupons of interest, which he holds, together with ten per cent, in current money of the United States, in satisfaction of his liability to the Company; which tender the plaintiff refused.

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KEST.

The prayer of the answer is, that the plaintiff's demand be rejected; that he be ordered to receive and cancel the bonds and coupons, tendered him, as the defendant's proportion of liability on said bonds; that the mortgage consented by the defendant to the Company, be cancelled, and that he may have judgment in reconvention for so much as may be due him on the bonds and coupons of interest, over and above his liability as a stockholder.

There was judgment for the defendant, that he be discharged from all obligation on account of his subscription for stock, and the Court considering that the mortgage, consented by him, had been extinguished by compensation, ordered it to be cancelled.

The bonds and coupons of interest, tendered by the defendant, are over due, and, it is conceded, that they belong to the series secured by the stock mortgage of the defendant. From the plaintiff's allegation, that the three-fifths for which he has made a call, are necessary to meet the matured bonds of that series, and the interest due on them, we infer that the amount called in will be sufficient for that purpose. The defendant then stands as a preferred creditor of the Company for the very amount he is called upon to pay. The claim of the Company against him has been liquidated and made demandable by the call which the plaintiff has made. The claim of the defendant against the Company is equally liquidated and demandable, and there was a sufficiency of assets to meet the matured liabilities, for which the stock mortgage of the defendant stands pledged. Under that state of facts, we think that, so far as the amount called in is involved, the District Judge correctly held the plaintiff's demand to have been extinguished by compensation.

As, however, the bonds and coupons of interest, held by the defendant, are not in the record, and we are unable to identify them in the decree, we will give judgment for the plaintiff, to be satisfied by the delivery to him of an equal amount of the bonds and coupons, tendered by the defendant.

The claim of the defendant, in reconvention, cannot be acted upon at this time. His rights will depend upon the situation of the Company when the last series of the preferred bonds matures, and the remainder of the subscription is called in.

It is ordered that the judgment be reversed.

It is further ordered, that the plaintiff recover of the defendant the sum of three thousand and sixty dollars, payable with an equal amount of the bonds and coupons of interest due by the Clinton and Port Hudson Railroad Company and tendered to the plaintiff.

It is further ordered, that the reconventional demand of the defendant be dismissed, without prejudice, and that he pay the costs of this appeal and of the District Court.

TWIBILL & EDWARDS v. J. & H. PERKINS.

In an action for the price of a thing sold, it is no defence that the buyer lacked the skill to discover an apparent defect.

A PPEAL from the District Court, Seventh District, Parish of West Feliciana, *Stirling, J. Brewer & Collins*, for plaintiffs and appellants. *U. B. & E. Phillips*, for defendants.

TWIBELL &
EDWARDS
v.
PERKINS.

Rost, J. (*Slidell*, J., dissenting.) The defendants, being sued upon a balance due upon their promissory notes, have pleaded the general issue, and a partial failure of consideration. They allege that a portion of the consideration of said notes was a quantity of sugar moulds, purchased by them of the plaintiffs, and that said moulds wholly failed to answer the purpose for which they were intended, and were worth one dollar per mould less than the price charged.

The District Judge was of opinion, that there was a partial failure of consideration, and the plaintiffs have appealed from the judgment reducing their claim by reason thereof.

The only serious objection made to the moulds, is the thinness of the iron used. This was an apparent defect, which, the plaintiffs' own witness states, a person, accustomed to using moulds, would discover without having to use them; he would tell by handling them, and could tell the moment he put his hand on them. Another of the plaintiffs' witnesses says, that they could be distinguished from the other moulds, in the refinery, by any person.

In connection with this evidence it is shown, that the moulds were shipped to the defendants in lots, as they were made, during a period of several months. And that, after receiving the first shipment, the defendants instructed the plaintiffs to increase the largest size, but did not require of them to use heavier material—that while they were receiving those moulds, and subsequently, they made with the plaintiffs several settlements, in which they gave their notes in payment of the moulds, at the prices agreed upon, without making any objection or reservation. It has been urged in their behalf, that they were but little acquainted with the use of sugar moulds at the time, and, consequently that the defects were not apparent to them, though they might have been to other persons.

It being shown that the defect complained of, if it really existed, which is doubtful, was apparent, the want of ordinary skill of the defendants cannot avail them. Even when the buyer does not know, or cannot see, an apparent defect, he is not entitled to a rescision of the sale; because, if he is disabled, or has not sufficient skill himself, he must cause an examination to be made by a competent person before purchasing. Pothier, *Contrat de la Vente*, Section 208.

In conformity with this theory, it has been held by the Royal Court of Paris, that a purchaser of pictures cannot claim the nullity of the sale, because the pictures are not by the painter whose name they bear. *Troplong*, who quotes the case with approbation, says, that the quality, which the reputation and talent of the painter gives to the picture, is not a concealed defect. Connoisseurs can discover it and distinguish the manner of each painter. They have positive data by which to classify the different schools, and the purchaser, by surrounding himself with their lights, might have avoided the error into which he fell, as to the merit of the thing purchased. *Troplong*, *De la Vente*, No. 555.

The defendants, carrying on a sugar refinery, are liable *in solido* as commercial partners.

It is ordered, that the judgment, in this case, be reversed, and proceeding to give such a judgment as the Court below should have rendered, it is ordered, that the plaintiffs recover of the said defendants, *in solido*, the sum of three

thousand, five hundred and fifty-one dollars and seventy-nine cents, with interest, at the rate of five per cent. per annum, from the 28th day of October, 1851, on the sum of twenty eight hundred and eight dollars and seventy-one cents—and from the 25th day of November, 1851, on the remaining sum of seven hundred and forty three dollars and three cents.

It is further ordered, that the plaintiffs recover three dollars, costs of protest, and that the defendants pay costs, in both Courts.

TWISSELL &
EDWARDS
V.
PERKINS.

JOHN LISSAC v. LEOPOLD KLAPMAN.

Under the 18th Section of the Act "to amend the several Acts enacted to organise the Courts of this State, and for other purposes," approved January 28, 1817—the District Judge of the parish of St. Tammany has power to appoint a Sheriff in default of any officer of the parish authorised to serve legal process.

A PPEAL from the District Court, Eighth District, *Baylies, J. Halsey*, for plaintiff. *Jones*, for defendant and appellant.

SLIDELL, J. The defendant is sued upon a promissory note made and endorsed by himself, and due 25th January, 1848.

The plea of prescription was properly disregarded. Suit was brought by a former holder, *Behrman*, in January, 1848, before the note fell due, and there was also a provisional seizure of goods, the price of which was the consideration of the note. In May, 1848, the action was dismissed upon the ground that it was prematurely brought, and on the 25th January, 1848, a citation in the present action, was served personally upon *Klopman*. The return is signed by "*A. S. Foster, Sheriff pro tempore.*" The first appearance of the defendant in the cause was in October following.

It is said the service of citation by *Foster* was a nullity, and did not interrupt prescription. We think otherwise. His written appointment is in evidence. It is signed by the District Judge of the District wherein the suit was brought, bears date 24th January, 1848, and recites "that there was, at the time, an *interregnum* in the office of Sheriff and that the coroner of said parish is absent, consequently there is no officer in the parish authorized to execute the legal process," &c. It declares the appointment to be made under the authority of the 18th Section of an Act entitled "an Act to amend the several Acts enacted to organize the Courts of the State, and for other purposes, approved January 28, 1817." The section is broad enough to cover the power exercised. It is not suggested by counsel, nor are we aware that this provision, in itself so obviously salutary and necessary to prevent a failure of justice, has been repealed. He was sworn into office, before the same Judge, on the day of his appointment. It does not appear that he had executed an official bond before he served the citation. But this omission does not, in our opinion, affect the validity of the service for the purposes of the present question.

On the subject of the reconventional demand for damages for an alleged illegal seizure and malicious prosecution, without noticing other points, it is sufficient to say, that it was considered by a jury of the vicinage; and a perusal of the evidence has not satisfied us that injustice was done by their verdict.

Judgment affirmed, with costs.

D. & A. WESSON v. GARRISON & FUQUA.

8a	136
104	140
104	141
8	136
Case 1	
114	444

The protest of a bill of exchange stated that the bill was presented for payment at the office of the drawees, to a gentleman styling himself book-keeper of the house, and who answered that he was duly authorized to say that the bill would not be paid. *Held*: This was a sufficient presentment and it was not necessary that the notary should certify that the drawees were at the time absent from the counting room.

The relations of drawer and acceptor create no right to call the acceptor in warranty.

A PPEAL from the District Court, Seventh District, Parish of East Feliciana, *Stirling, J. Merrick*, for plaintiffs. *Pond, jr.*, for defendants and appellants.

SLIDELL, J. We think the District Judge did not err in treating as an answer what the defendant styled a peremptory exception.

The bill was properly protested on the third day of grace, 4th February, the request in the body of the bill being to pay on the 1st February. The bill was drawn in New York on a New Orleans drawee. The discussion in the appellants brief of foreign usage, is utterly irrelevant.

The protest states, that the bill was presented for payment at the office of *G. Burke & Co.*, the drawees, to a gentleman styling himself book-keeper of that house, and who stated that he was duly authorized to answer the bill would not be paid. This was a sufficient presentment, and it was not necessary the notary should certify that the drawees were at the time absent from their counting room.

In their answer, the defendants alleged that they had funds in the hands of *G. Burke & Co.* to meet the bill, and that, by accepting, they undertook to pay it, and the defendants asked leave to cite them in warranty, which the Court refused. We do not consider the relation of drawer and acceptor as creating a right to call in warranty, under article 379 of the Code. It has not been so understood in practice, and does not fall within the strict terms of the Code. The drawer has his recourse against the acceptor when he has paid, but has no right to delay the holder until he can bring him in. See *Lanusec v. Massicott*, 3 Martin, 261.

We think this appeal was taken for delay, and the appellants prayer for damages must be sustained.

Judgment affirmed, with \$20 as damages for a frivolous appeal.

8	136
Case 2	
114	503

JOSIAH D. FULLER v. ROBERT W. COWELL. MUSHET & PEARSON,
Warrantors.

The ignorance of the vendor that the cotton sold by him was falsely packed, does not exempt him from liability for the difference between the value of the bales, in their actual condition, and what the value would have been if the quality throughout the bale had been uniform with the samples.

Where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference at the time and place of sale, between the actual value of the bales falsely packed, and what they would have been worth, if the entire contents had corresponded with the outer portion.

A PPEAL from the Fourth District Court of New Orleans. *Reynolds, J.*
Action for loss sustained on the purchase of a number of bales of cotton.

FULLER
v.
COWELL.

Petition charged "that the outside of said bales was composed of good, sound and merchantable cotton, extending further into the interior of the bales than the usual mode of inspection would enable a person to examine," &c. ; but that said bales were "plated on the outside with sound and merchantable cotton, &c., but were falsely packed in the interior of the bales with cotton badly damaged, &c. &c.

Bonford & Finney, for plaintiff. *Benjamin & Micou* and *Wolfe & Singleton*, for defendants, warrantors and appellants.

SLIDELL, J. Although there is a conflict of testimony, our minds have been brought to the same conclusion as the District Judge came to, that is to say, that the cotton in the interior of the bales was of a decidedly inferior quality to that of the outer portion ; in other words, that the cotton was what was called in the market, falsely packed. Such packing, it is proved, is not discoverable by the usual examination which buyers make. The plaintiff, it is true, admitted at the trial, the defendant was not aware of this false packing ; but this absence of knowledge does not exempt the vendor from liability for the difference between the value of the bales in their actual condition and what it would have been if the quality throughout the bale had been uniform.

There was an effort at the trial below, and in argument here, to avoid responsibility, on the ground that this cotton had been repacked in New Orleans, in consequence of a fire having occurred at the Press where it was stored, and that the fact of its having been repacked, was communicated to the plaintiff. And witnesses were called to prove that repacked cotton is not considered as favorably in the market as cotton which has not undergone that process. The reason, as stated by a cotton dealer, is "that in repacking cotton they have to pick it out in various piles, and through carelessness there may be a slight mixture, and in repacking, occasionally a rope might be picked up. Buyers of repacked cotton know these facts." But this evidence is insufficient to account for the condition of the cotton in question, or to exempt the defendant from liability. There was here, according to the testimony of the plaintiff's witnesses, to whom the District Judge gave credence, a marked discrepancy between the outer cotton and the interior of the bales, which can only be accounted for on the hypothesis of false packing. Moreover, in this case, samples were furnished by the seller to the buyer, and the classer, employed by the plaintiff, testified that he found, on drawing samples from the edge of the bales in the usual manner, that they corresponded with the samples so furnished. The witnesses concur in stating that false packing is not discoverable by taking samples from the bales in the usual manner.

In a case of this sort, where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference at the time and place of sale between the actual value of the bales thus falsely packed, and what they would have been worth if the entire contents had corresponded with the outer portion. The actual loss incurred by the plaintiff in the foreign market, where he sold the cotton, had it been thrown back on his hands by the buyer, and then resold at a lower price, is not the rule of damages, although it may be considered, with other evidence, for the purpose of estimating the per centage of inferiority.

It is, therefore, decreed, that the judgment of the District Court be reversed, and it is further decreed, that the plaintiff recover of the defendant the sum of \$354 74, with interest at the rate of five per cent. per annum from the 5th

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April, 1851, until paid, and costs of the suit in the Court below—those of the appeal to be paid by the plaintiff.

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1116 887

MARIE JOSEPH DEDE, et al, v. LUDGER BOGUILLE, f. m. c.

To constitute a title translatif of property, the judicial sale must be accompanied by the judgment and execution.

APPEAL from the Second District Court of New Orleans, *Lea, J. Murphy*, for plaintiff. *Durant & Horner*, for defendant and appellant.

ROST, J. In 1844, the plaintiff, *Marie Joseph Dédé*, was enjoying the usufruct of a house and lot, belonging to her children, one of whom was a minor at the time. Her right of usufruct was seized and sold by the Marshal of the city of New Orleans, and the defendant became the purchaser. There was sold, at the same time, one undivided sixth of the property, represented in the act of sale, as having been inherited by the defendant from one of her deceased children.

In 1852, she instituted this action to recover the property, with rent and damages, on the ground that the sale was informal and otherwise void—that the usufruct of her children's property was not liable to seizure—that the defendant had violated the obligation of a usufructuary by suffering the property to go to decay, while in his possession. Her children joined in the suit, praying that in case the sale should be sustained, the usufruct might be forfeited for a violation on the part of the defendant, of the duties and obligations of the usufructuary. They also prayed for damages. The general issue and prescription were pleaded in defence.

The District Judge avoided the sale, and gave judgment for the rent of the house, at the rate of \$9 per month. The defendant appealed.

The defendant's title is not admitted, and the only evidence offered to establish it, is an act of sale by the Marshal of the former City Court of New Orleans. The settled jurisprudence of this Court is, that to constitute a title translatif of property, the judicial sale must be accompanied by the judgment and execution. We conclude, therefore, that the defendant has not shown a title sufficient to divest that of the plaintiff to the usufruct, or to any undivided interest in the property. Whether or not the Marshal's sale was sufficient to make him a possessor in good faith, the judgment must remain undisturbed. If he was not in good faith, he owes the rent which he has been adjudged to pay. If he was in good faith, his possession of five-sixths of the property was that of a usufructuary, and he is liable in damages for having suffered the property to go to decay, and the evidence satisfies us that the amount allowed as rent does not exceed five-sixths of the sum necessary to put the house and buildings in a proper state of repair.

We think justice has been done between the parties.

Judgment affirmed, with costs.

J. B. BYRNE & CO. v. SAMUEL ANDERSON, et al.

If the Sheriff leaves the property in the possession of the debtor it is at his own risk. His responsibility for the goods levied on continues so long as he can keep possession of them under the execution.

A PPEAL from the District Court, Tenth District, Parish of Madison. *Perkins, jr., J. Stockton & Steele*, for plaintiffs and appellants. *Short & Parham*, for defendants.

DUNBAR, J. (*Slidell, J.*, dissenting.) This is a suit brought on a Sheriff's bond against the principal and sureties.

The plaintiffs allege that on the 5th January, 1849, they obtained from the Judge of the Tenth Judicial District, for the parish of Madison, an order of seizure and sale, against certain slaves, the property of *Mary Stanford*, wife of *Richard C. Stanford*; and, on the same day, placed in the hands of *Samuel Anderson*, the Sheriff of the parish of Madison, a writ of seizure and sale directed to him, returnable in not less than thirty nor more than seventy days.

That the said Sheriff, soon thereafter, levied on the said slaves, and advertized them for sale on the first Saturday in March, 1849. That he afterwards permitted three of the slaves, that had been levied upon, to be taken out of his possession and carried beyond the jurisdiction of the District Court of Madison, by which neglect of duty on his part, the plaintiffs have lost a large portion of their debt, and have sustained damages to the amount of eight hundred and ninety-one dollars and fifty-eight cents.

It is shown, that on the 29th of March, 1849, the parties agreed that as many of the slaves, levied upon by the Sheriff, as would be necessary to bring the sum of fifteen hundred dollars, should be sold on that day by the Sheriff, and the remaining slaves should be re-advertised to be sold by him on the first Saturday in June thereafter. That in conformity with this agreement, all of the slaves levied upon were sold at the Sheriff's sale on the 29th March, except three, named *Mila, Susan and Harriette*. The proceeds of the sale amounted to thirteen hundred and eighty-three dollars and fifty-eight cents, which sum was credited on the writ, leaving a balance, due the plaintiffs, of eight hundred and ninety-one dollars and fifty-eight cents. The writ was not returned by the Sheriff, who made an endorsement on the appraisalment in his own handwriting: "Advertise the three slaves for June." But before the first Saturday in June, the three slaves, who had been left by the Sheriff with *Mrs. Stanford*, or her agent, on her plantation, were by them removed from the parish of Madison.

It is well settled, that if the Sheriff leaves the property in the possession of the debtor, it is at his own risk; his responsibility for the goods levied on, continues so long as he can keep possession thereof under the execution. Having made the levy before the return day, he had the right, and it was his duty, to have kept the slaves safely until they were all sold. He has given us no excuse for his negligence. *Gwynne on Sheriffs*, 299.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that there be judgment for the plaintiffs against the defendants *in solido*, for the sum of eight hundred and ninety-one dollars and fifty-eight cents, with legal interest from judicial demand, with costs in both Courts.

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v.
ANDERSON.

SLIDELL, J., dissenting. I think there should be judgment against the late Sheriff, at least, for part of the amount claimed; he not having duly accounted for the securities and cash put into his hands by *Patterson*. But, in my opinion, the evidence shows an assent by the plaintiffs' attorney to an arrangement by which the matter was taken out of the legal course; and the loss which ensued ought not, it seems to me, to fall upon the Sheriff's sureties, to whom no privity in the arrangement is shown.

I think proper to add, that a part of the arrangement made by the agents of the plaintiffs and defendant, seems to me against public policy. Moreover, I have no reason to doubt but that the plaintiffs would have collected their whole debt, if their agent had insisted on their legal rights, and not acted in a spirit of indulgence, extending a confidence which was violated.

CHARLES L. WILSON, Curator, v. JOHN D. IMBODEN.

Clerks of Court have no authority, under the Act of 1838, to appoint administrators of estates, under five hundred dollars, when no one will accept their administration and give security.

The Act of 1846 does not authorise Clerks of Courts to appoint administrators of small successions, but requires them to assume their administration themselves.

The validity of the appointment of Curator can be inquired into collaterally, when such appointment is not good on its face.

APPEAL from the District Court, Tenth District, *Perkins, jr., J. Clark & Wilson*, for plaintiff and appellee. *Selby*, for appellant.

DUNBAR, J. (*Slidell, J.*, dissenting.) *D. G. Campbell* died in the State of Arkansas, leaving an estate of some magnitude there, and also a last will, wherein he names an executor, who regularly qualified. The decedent's property, in this State, consisted only of a claim against defendant for the hire of some negroes, amounting to \$346, according to the inventory and appraisement. Plaintiff, averring himself to be a creditor, applied to the Clerk for the Curatorship of the succession in this State, who without advertising the application or requiring bond and security, appointed the applicant on the same day the petition was filed, curator of the estate, on taking the oath. The present suit was then commenced by him against defendant, who peremptorily excepted to plaintiff's capacity to sue. The exception was overruled, and, on the merits, judgment was rendered against defendant, from which he has appealed.

Plaintiff relies, for the validity of his appointment, upon the Act of 1838, amendatory of Article 1178, of the Civil Code, and also upon the Judiciary Act of 1846, p. 64, sec. 2. The first conferred the power upon Probate Judges of appointing administrators to estates under five hundred dollars, which no one would accept the administration of, and give security—merely requiring the usual oath and dispensing with the public notices and the bond.

This Act, extending these powers to Judges of Probate, cannot be held to embrace Clerks of Courts. We must seek for their authority in the Act of 1846, when, as the probate system had been essentially altered, it was found expedient to confer upon Clerks many of the powers held by the former Probate Judges. But on referring to it we find, not that clerks were authorised to appoint administrators to these small successions, without giving bond and secu-

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ity, but that they themselves should assume the administration. It may fairly be presumed that in framing this particular section of the Act of 1846, the Legislature had before them the Act of 1838, on the same subject; and, therefore, the will of the lawmaker is the more clearly understood—that Clerks should not have the power of making such appointments, but should assume the duties. It is objected that the validity of the appointment cannot be enquired into collaterally, and we are referred to 2 Lou'a, p. 250; 1 Rob. p. 258, and 3d Rob. p. 130. This is correct when the appointment is good upon the face of it, but in the present instance, the authority under which the plaintiff has any right to appear in Court, purports to have issued from an officer without the capacity to make it, and is, therefore, absolutely null.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed. That the exception, filed by the defendant, be sustained, and the suit dismissed, the plaintiff and appellee paying costs in both Courts.

J. S. R. GUAY v. T. L. ANDREWS.

The surety, on a bond for the delivery of property attached, is not exonerated because the judgment against the principal did not decree the property attached to be sold. Whatever may have been the form of the judgment, the condition of the bond would have been satisfied by the delivery of the property attached.

In proceedings against a surety on the replevin bond of a defendant in attachment, the return of no property found, contemplated by the Act of 1839, is to be made by the Sheriff of the parish in which the judgment in the attachment suit was obtained—and not by the Sheriff of the parish to which the defendant in the attachment, may have removed.

A PPEAL from the District Court, Seventh District, Parish of East Feliciana. *Stirling, J. Merrick*, for plaintiff. *Winter*, for defendant and appellant, *Rost, J.* On the 21st March, 1839, the plaintiff instituted a suit by attachment, against *Sarah Rhodes*. The Sheriff executed the attachment by seizing certain slaves, belonging to *Mrs. Rhodes*. On the same day *Mrs. Rhodes* executed her bond, with the defendant, *Andrews*, as her surety; the condition of which was, the delivery of the slaves attached to the Sheriff, in the event of a judgment being rendered against her.

There was judgment against *Mrs. Rhodes*, and execution having issued, and being returned "no property found," the plaintiff moved for a judgment against *Andrews*, the surety, under the Act of 1839. The motion prevailed, and *Andrews* has appealed.

It is nothing to the surety, *Andrews*, that the judgment in the main suit did not decree the property attached to be sold. The defendant was in Court and a personal judgment could be rendered against her. Whatever was the form of the judgment, the defendant would have satisfied the condition of the bond by delivering the property attached, after it was rendered.

When the execution came into the hands of the Sheriff, he called on the plaintiff's counsel to point out property of the defendant, which the counsel

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declared, in writing, he was unable to do, and the Sheriff, not knowing of any himself, at once returned the writ. We know of no law declaring such a return premature or illegal.

It is alleged, that it was notorious that the defendant had removed to another parish, and that the execution should have been sent to the Sheriff of the parish of the new domicile. The Act of 1839 does not say so, and the return which it contemplates, is evidently that of the Sheriff of the parish in which the judgment was rendered.

After the judgment had been rendered in the original suit, the counsel for the plaintiff entered, of record, a correction of it, stating that he had made an error in adding up the account, upon which the suit was partly brought, and that the amount of it was only \$79 82, instead of \$160 82, which the District Court had allowed. The surety claims the benefit of this credit, and we are of opinion that he is entitled to it. This correction may be viewed as an entry of satisfaction of the judgment *pro tanto*, and such entries for a part, or for the whole, may lawfully be made, by the attorney, of record. It is a remittitur, of which the defendant, and his surety, may take advantage.

It is ordered that the judgment be reversed.

It is further ordered, that the rule be made absolute, and that *Mary Sturges*, in her capacity of dative testamentary executrix of *J. S. R. Guay*, deceased, have judgment against the succession of *Thomas L. Andrews*, represented by *Charles C. Lathrop*, for the sum of three hundred and eighty-seven dollars and thirty-two cents, to be paid in due course of administration.

It is further ordered, that the defendant pay the costs of the District Court, and the plaintiff those of this appeal.

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CECILE, f. w. c. v. SIDNEY A. LACOSTE AND WIFE.

A bequest in the following words: "I give and bequeath, in consideration of her good and faithful services, to the free *griffe* woman *Cecile*, three arpents front of my land, to be taken from the line of the plantation of *Honoré Faure*, with the whole depth, to be enjoyed by her during her life in usufruct; the said land, after her death, to belong to her children"—is a particular legacy.

A particular legatee is not bound to contribute to the payment of the debts of the succession, where the succession is rich; and an usufructuary, under a particular title, is not bound to discharge the debts for which the property bequeathed is mortgaged.

The universal legatee is, by l. w., bound to discharge the debts of the succession.

If the effect of the testamentary disposition to *Cecile* is held to vest the property in the heirs, legal or testamentary, a substitution would be created in relation to it, and the disposition itself would fail. There can be no doubt that the intention of the testatrix was, to vest the property in the children of *Cecile*, and give her the usufruct, to terminate at her death, provided her life did not extend beyond the term assigned by law for the duration of an usufruct.

APPPEAL from the District Court, Ninth District, Parish of Point Coupée, *Farrar, J. Provosty & Roy*, for plaintiff. *Cooley*, for defendant and appellant.

Appellant's counsel maintained that the legacy was by universal title, and that the legatee was bound to pay her proportion of the debts of the testator.

Code, 580, 581. The will contains a substitution. *Rachal v. Rachal*, 1 L. R. 118. Under it

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1st. The children of Cecile did not take the naked property on the death of the testatrix.

2d. There was no one *in esse*, clearly designated by the will, to take the naked property on the death of the testatrix.

I. Unless the language of the will is entirely perverted, under the pretext of searching for the intentions of the testatrix, it is utterly impossible to say that "*devant appartenir après sa mort*," means, that the children are to be proprietors *avant sa mort*; and to this it must come, if the children of Cecile have any title under the will, before the death of their mother. There is no room for equivocation; the words stare us in the face, and defy the ablest ingenuity to torture them into a different meaning. "Candles are not to be lighted when the sun shines brightly." 7 L. R. p. 230.

II. But there is no certainty, even as to who are to be the legatees under this clause: "*la dite terre devant après son décès appartenir à ses enfants*." All the present children may die, and the plaintiff may have other children at the time of her death. If so, these latter are the legatees meant in the will. In the case of *Rachal*, above mentioned, which was almost entirely similar in this respect, the Supreme Court decided that the testator meant children existing at the time of the death of the original legatee. The words in the will were, "*si elle décède avant son mari, les dits biens passeront à ses enfants, tels qu'elle les aura reçus de moi*."

In the case just mentioned, the Court intimates, that "if the testator had named the children living at the time he made his will; had instituted them his heirs, and had provided, that after the death of their mother, they should take the property, it might, *perhaps*, have been difficult to distinguish such a disposition from that permitted by Art. 1509." The case here, does not come even under the liberal view taken of what, *perhaps*, might be decided; for the will does not name the children, and does not institute them heirs of the testatrix. Should they all die before their mother, they cannot transmit any title to their heirs; whereas, the person "to whom the naked property in an estate is bequeathed, has a right transmissible to his heirs, who may become absolute owners by the death of the usufructuary."

Besides, under the name of children, are comprehended not only the children of the first degree, but the grand children, great grand children, and all other descendants in the direct line. C. C. 8522.

"*Liberorum appellatione nepotes et pronepotes, eosque qui ex his descendunt continentur*." L. 220, § de verb. sig. Merlin R. de J. verbo *Enfant*.

The case of *Roy v. Latiolais*, which bears the nearest similarity to the present, was decided by only two Judges—Judge Rost, dissenting. Besides, in that case, the legatee was named and made certain. 5th Ann. 556.

The case of the *Succession of Ducloslange*, 4 R. R. 410, is also distinguishable from the present in this: the terms used were "*reversible après elle à mes enfants*," which conveys a different idea from "*devant appartenir*." In the one case, the existence of the title previous to the death of the usufructuary, seems to be understood—*there is room for interpretation*; but in this case it is almost impossible to understand the will differently from what is contended for by the appellees.

The decision, however, of the case of *Ducloslange*, when closely examined and compared with all the other cases of a similar character, appears to be incorrect. It is, of course, with diffidence that such a proposition is started, but it is with a firm conviction that, according to the true principles which should govern the case, there was a substitution, reprobated by the law, in the will of *Ducloslange*, and, as it stands alone, perhaps the present case affords a good opportunity to come back to the true fundamental principles of the subject. It is believed, also, to be in contradiction with the case of *Rachal v. Rachal*.

If this latitude of interpretation is allowed in relation to wills, we may as well forget all that we have learned in relation to substitutions; because it is so easy to suppose that the testator intended to make a valid will; and the presumption that he intended to do so—supplying interpretation—it would be difficult to find a case where a will would be annulled.

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v.
LACOSTE.

EUSTIS, C. J. This appeal is taken by the defendants from a judgment of the Court of the Ninth District, sitting in the parish of Pointe Coupée, rendered in favor of the plaintiff, against *Virginie Eneault*, one of the defendants and wife of *Sidney A. Lucoste*.

This judgment was for the recovery of a piece of land, having one arpent front by eighty arpents in depth, with the improvements thereon, the same having been bequeathed to her in usufruct, and the property to her children, by the last will and testament of the late widow *Simon Porche*. The judgment is against the defendant as the universal legatee of the testatrix, as recognized by a judgment of this Court, rendered on the 8d February, 1852, affirming the judgment appealed from. *Marcellin Major et al. v. Virginie Eneault*, 7 Annual Reports.

The bequest to the plaintiff was for three arpents of land in usufruct, but as she held two of them under a good title, the litigation is confined to her rights in the one arpent front, by the depth of eighty acres.

The testatrix says, in her will, after instituting *Virginie Eneault* her universal legatee: "I give and bequeath, in consideration of her good and faithful services, to the free griffe woman *Cecile*, three arpents front of my land, to be taken from the line of the plantation of *Honoré Fleuve*, with the whole depth, to be enjoyed by her during her life in usufruct, the said land, after her death, to belong to her children."

We do not concur in the opinion of the counsel for the defendants, that the legacy constitutes what is called an universal title. It is the legacy of a distinct object, and is of that class called particular legacies. The plaintiff, as a particular legatee, is not bound to contribute to the payment of the debts. The succession is rich, and, as an usufructuary under a particular title, the plaintiff is not bound to discharge the debts for which the property bequeathed is mortgaged. Code, Art. 575. The universal legatee by law, and in this case, by the express command of the will, is bound to discharge all the debts of the succession.

At the time of the decease of the testatrix, the plaintiff had eight children living—the youngest was born years before the date of the will.

If the effect of this testamentary disposition is held to vest the property in the heirs, legal or testamentary, a substitution would be created in relation to it, and the disposition itself would fail.

A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none. Code, 1706.

In avoiding this construction, which killeth, we are carrying into effect the intention of the testatrix, and have in view her purpose of beneficence, which was to recompense a faithful and deserving servant.

The clause of the will is badly expressed, but there can be no doubt, we think, as to whom were the object of the charity of the testatrix. We think it vested the property in the children of the plaintiff, and gave her the usufruct, to terminate on her death, provided her life should not extend beyond the term assigned [by law] to the duration of the usufruct.

The judgment of the District Court is, therefore, affirmed, with costs.

8	145
119	187

HENRY PARISH, et al, v. MUNICIPALITY No. 2, et al.

On an exception that the petition discloses no cause of action, all the facts alleged must be taken as true, provided they are possible, but their legal consequence is presumed to be denied.

Servitudes are restraints on the free disposal and use of property, and are, on that account, not entitled to be viewed with favor by the law. Hence servitudes, claimed under titles, are never sustained by implication; the title creating them must be express as to their nature and extent, as well as to the estate which owes them, and the estate to which they are due.

The servitude of view is sometimes considered in law as including the servitude of prospect, as well as that of light. But it may well be doubted whether a servitude of prospect can be established in our modern cities, where the houses are contiguous and no open space, save the streets and public squares, are habitually left, except, perhaps, in the case of adjoining lots. And if it can, the great inconvenience which would result from it, makes it the duty of Courts not to recognize it without an express constitution of it by title, in favor of buildings erected, or to be erected.

The right of perpetual front on the river is a new and unusual servitude, which, even if established by the title, would not be recognized; and the authorization of the Legislature to sell a portion of the batture for building lots, is conclusive evidence that such servitude would have been against public policy. The same is true as to the servitude of prospect.

The Legislature ure has, at all times, a right to change the destination of public places.

The law defines servitudes to be charges imposed on an estate for the use and utility of another estate.

They, accordingly, terminate when things are in such a situation that the servitudes can no longer be used. (EUSRE, C. J.)

The legal principle of ownership involves that of exclusive dominion and the right of enjoying and disposing of property independent of others, and under the sole restraint of the law. Servitudes are created by the dismemberment of the absolute right of ownership, which thereby becomes modified and imperfect. (EUSRE, C. J.)

The first presumption, presented by the fact of ownership, is clearly in favor of the absolute, perfect right, and no adverse right can be recognised, unless it results from presumptions which the law has established, or parties themselves have agreed as to its nature and purpose; and in this last case, the establishment of servitudes by covenant, certainty as to these relations, is a requisite essential to their validity. (EUSRE, C. J.)

For the establishment of servitudes by the agreement of parties, they ought to be declared and described with certainty as to the property in favor of which they are created, as to the property subjected, and as to the nature of the charge imposed. (EUSRE, C. J.)

When a stipulation exists in favor of a person, the owner of an estate, the language might be such, or the whole tenor of the act be such, that a servitude might be fairly deduced; and in a case of that kind, reference ought to be had to the respective conditions of the estate, as affected by the servitude, in their locality, uses, convenience and value. (EUSRE, C. J.)

Parties cannot be permitted to derive any advantage from vague and uncertain allegations, when they relate to matters defined in written instruments. The cause of action, the object of the demand, and the nature of the title, must be stated with such certainty as to apprise the defendant of every fact necessary to put him on his just defence. (EUSRE, C. J.)

A PPEAL from the Second District Court of New Orleans, *Lea, J. Benjamin & Micou*, for plaintiffs and appellants. *H. R. Denis*, for heirs of Gravier.

ROST, J. * The plaintiffs represent that they are the owners of lots fronting on New Levee Street, in that part of the city formerly called Faubourg St. Mary, and that they derived their titles from persons who, with the city of New Orleans, are made defendants in this suit.

That the title to those lots, and to the batture in front of them, was many years in litigation between their vendors and the City, until, to settle forever the rights of the conflicting claimants, on the 20th of September, 1820, they entered into a compromise, in which the following stipulations are found:

"Which said appearers on the first part, in their own names, and in their aforesaid capacities, and as possessors of the batture in front of Suburb St.

* *BRIDELL, J.*, declined sitting.

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Mary, or representing the said possessors, being desirous of favoring the public with the use of the bank of the river, in front of said batture, and of facilitating the communication of streets which run thereto, have, by these presents, made irrevocable donation *inter vivos*, and in the best form in which a donation may validate to the mayor, aldermen and inhabitants of New Orleans, represented by the Hon'ble *Joseph Roffignac*, Mayor of said city, here present, and accepting and stipulating for the said mayor, aldermen and inhabitants, &c., &c.

"The donation is made with the express condition, a condition without which it should not have been made, to wit: That all the grounds which are the objects of said donation, shall remain inalienable and not subject, or liable, to be seized for debt, or otherwise, in the hands of the corporation of New Orleans, who shall never, under any pretence whatever, sell, exchange, give, or otherwise dispose of them, in toto, or in any part, nor employ them for, or to any other use, than the one to which they are naturally destined to; nor shall there be made or erected on them any constructions or buildings, except, however, the case when the City Council shall think it convenient for general public interest to establish steam water works on any part of the batture hereby given, which said City Council shall think to choose for that purpose. It is, however, agreed that the prohibition of erecting buildings or constructions, shall not be construed so as to prevent the Mayor and City Council of New Orleans from establishing wharves, to facilitate commerce, when they shall deem it convenient."

The plaintiffs further allege, that in consideration of this abandonment, the defendants were to enjoy without molestation, as their own, all that portion of said front, lying and being between New Levee street and Tchoupitoulas street, the property now owned and possessed by said plaintiffs.

It is further alleged, that by the terms of said act, a real or prædial servitude in the nature of a servitude of passage, of view, and of perpetual front upon the river, was created upon the batture, in favor of the lots of the plaintiffs, which has passed to them and become their property, as an accessory to their lots.

That at the time of the division of the city, in 1836, the batture fell in the Second Municipality, and the reservations in the act of compromise then received the sanction and approval of the Legislature.

That a law has recently been passed authorizing the Second Municipality to compound with the original parties to the act of compromise, for the extinguishment of the servitude, and to sell a portion of said property, and that they are the only proper representatives of the parties to the act of compromise, and the only persons entitled by law to indemnity for the loss of said servitude. But that the defendants have set up a claim and pretensions to be the owners of said servitude, and to be entitled to indemnity for the extinction thereof, and that, thereupon, the Second Municipality has executed with them another act of compromise, giving them one third of the proceeds of that portion of the batture of which the Legislature has authorized the sale, in consideration of which they ratify the change of destination and renounce to all their rights to the remaining portion of the batture, and its future increase, in favor of the city.

That the servitude of which these parties have attempted to dispose, belongs to the petitioners, and is a right of property, of which they could not, under the Constitution, be deprived without just compensation being previously made.

That, to promote the interest of the City, they are willing to waive their rights to previous indemnity, and to consent to abide by the terms of the compromise last mentioned, provided it be made to inure to their benefit, and one third of the proceeds of the sale, it contemplates, be paid over to them.

They pray that they may be recognised as the owners of the servitude claimed.

That the City be decreed to pay over to them, one third of the proceeds of the lots authorized to be sold, as the price of said servitude, and that the other defendants be for ever prohibited and enjoined from claiming any right or title to the servitude aforesaid, or to any compensation or indemnity for the loss thereof, and from interfering with the aforesaid right of your petitioners.

The defendants excepted to the petition, on the ground, among others, that it discloses no cause of action against them. The plaintiffs have appealed from the judgment sustaining that exception.

If, in truth, the original proprietors of the batture have sold to the City the property of the plaintiffs, we can see no good reason why the plaintiffs should not be permitted to ratify the sale and claim the price. But the first question is—have the defendants disposed of property or rights which belonged to the plaintiffs? It is urged in their behalf, that on the trial of the exception, all the allegations in the petition are to be taken as true, and that it must, therefore, be assumed that the act of compromise, of 1820, created on the space in front of their lots, the servitude which they claim. The rule they invoke is to be understood in a more restricted sense. All the facts alleged must, on such an issue, be taken as true, provided they are possible in themselves, but their legal consequence is presumed to be denied. See *Shelmerdine v. Duffy*, 4 N. S. 38. The facts that the act of compromise, referred to, was passed, and that it contains the stipulation relied upon by the plaintiffs, must be taken as true, but whether that stipulation creates a servitude, is a question of law fairly at issue between the parties.

Servitudes are restraints on the free disposal and use of property, and are not, on that account, entitled to be viewed with favor by the law. In consequence of this, servitudes claimed under titles, are never sustained by implication—the title creating them must be express, as to their nature and extent, as well as to the estate which owes them, and the estate to which they are due. "It must, as near as possible, specify the nature of the servitude, limit it, and distinguish it, so that there may be no doubt as to its nature, and the use that can be made of it." A sale, in which it was stated, that the land sold was subject to a servitude, in favor of another estate, without specifying the servitude, has been held insufficient to establish it. See Lalaure, *Des Servitudes*, pages 46 and 50; Pardessus, *Traité des Servitudes*, p. —.

Is the servitude claimed expressly established by the act of compromise of 1820? That act is silent in relation to servitudes—it does not specify, limit or distinguish any, and mentions, in express terms, neither the estate that owes them nor the estate to which they are due. The only moving cause which it expresses for the donation it contains, is the desire of the grantors to favor the public with the use of the banks of the river, in front of the batture, and of facilitating the communication of streets which run thereto. This was the avowed object of the grant. It was a lawful object, and those who enjoy the doubtful advantage of having witnessed the contentions which preceded the

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compromise, know, as a part of the history of the country, that the true and only object of this stipulation was to secure to the public, over this portion of the batture, the rights which it previously claimed and enjoyed over all the alluvion in front of Tchoupitoulas street.

To disregard the words of the instrument, therefore, for the purpose of establishing a servitude, by a remote and uncertain implication, would be alike a violation of truth and of law.

But what is the servitude claimed? The plaintiffs' counsel themselves are unable to define it with precision, and vaguely assert, that it is in the nature of a right of way, of view and of perpetual front, upon the river. So far as it is a right of way, or a right of view, the plaintiffs enjoy both by means of the street which separates their property from the batture, and of the continuation of those which extend to the river, over the batture. We agree fully with the authority cited from *Dalloz*, that the fact of having a door opening upon a street, constitutes a servitude on that street—in this sense, that if the destination of the street is changed, and it is adjudged by government to an individual, it remains subject to the servitude of passage. *Dalloz*, 1828, 1, 124. But the street has not been taken from the plaintiffs, and those servitudes, even if they were expressly established, would not extend beyond it. See *French v. Carrollton Railroad Company*, 2d Ann. page 80.

It is true that the servitude of view is sometimes considered, in law, as including the servitude of prospect, as well as that of light—but we greatly doubt whether a servitude of prospect can be established in our modern cities, where the houses are contiguous and no open spaces, save the streets and public squares, except, perhaps, in case of adjoining lots, are habitually left—and if it can, the great inconvenience which would result from it, makes it the duty of Courts not to recognize it, without an express constitution of it by title in favor of buildings, erected or to be erected. In 1820, the land now held by the plaintiffs, was a mere sand bank, and the intention to erect buildings upon it, is not mentioned in the act of compromise. "Urban servitudes include all those that are due to buildings, wherever situated." *Lalauré*, p. 14, par. 8d, tit. 31, law 1 and 2. *French v. Carrollton R. R. Co.*

The right of perpetual front upon the river, is a new and unusual servitude, which the title can, in no sense, be considered as establishing, and which we would deem it our duty not to recognize if it did. The change of the destination of the batture, and the authorization of the Legislature to sell a large portion of it for building lots, is conclusive evidence that such a servitude would have been against public policy. The same thing may be said of the servitude of prospect. Civil Code, 705.

To ascertain whether servitudes are contrary to public policy, regard must be had to the circumstances of the country and its wants. Thus, in all settled countries, where the land is all occupied, and few changes take place, it is held, that the use of a road, by the public, over a man's land for some years, creates a servitude of way. But we have held, that it would be against public policy to give the same legal effect to the use, by the public, of a path over the unenclosed and uncultivated lands of Louisiana, and that roads, thus used even for a long time, and recognized by the local authority, were not public roads, in the sense of the Civil Law. See the case of *Hatch v. Arnould*, 8d Ann. 482, and the case of [Name of the case omitted by the Court.—*Rep.*] not reported.

We are of opinion that the plaintiffs have failed to establish the servitude which they claim.

It has been asked, what the nature of the right, created by the compromise, was, if it was not the right of servitude? We have already stated that the conditions appended to the nominal gift of the batture, amounted to a dedication of it to the public, to be used as an open space, and had no other object.

The defendants might, for purposes of public utility, thus deprive the city of the right of alienating the batture, or of erecting buildings upon it. But, as we held in the case of the *State of Louisiana v. The Executors of McDonough et al.*, such a stipulation was at all times under the control of the Legislature, who could modify the effects of it and change the destination of the property whenever such a change became of public advantage. Its power to change the destination of it, was expressly recognized by us in the case of *Delabigarre v. The Second Municipality*, 3d Annual, 230.

The power of the Legislature to change the destination of public places, had been previously recognized in the case of *De Armas v. The Mayor et al.*, 5 L. R. 174 and 194; *The Mayor et al. v. Hopkins*, 18 L. 351; *New Orleans v. The United States*, 10 Peters, 733; *Municipality No. 2, v. The Orleans Cotton Press*, 18 L. 122. These cases were all argued by the ablest counsel at the bar, and the opinions of the Court were prepared with uncommon care. In two of them, *Judge Martin* dissented on other points—but the Court was, in all the cases, unanimous in recognizing the power of the Legislature to change the destination of the quay and of the batture in front of the City of New Orleans. After so many solemn adjudications, the defendants do not appear to have had any serious claim which they could compromise. So that, while the act of 1820 was a compromise under the form of a donation, the act executed in 1851, would seem to be a donation, under the form of a compromise. The plaintiffs acquired no rights under that act, the gift not being intended for them. The Act passed by the Legislature in 1850, has been adduced by the defendants in support of some undefined right. It is our duty to give full effect to that Act, so far as it changes the destination of a portion of the batture, and authorizes the sale of it. But we deem it also our duty to disregard, as an assumption of judicial power unauthorized by the Constitution, whatever in it may be considered as recognizing, in the defendants, any legal rights under the compromise, after the change of destination of the property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs.

ECSTIS, C. J. This suit is instituted by the plaintiffs, who are the owners of the lots fronting on New Levee street, in this city, for the recovery of one third of the proceeds of certain lots, situate on the batture in front of their property, recently sold under an Act of the Legislature. They claim it as the price of a servitude, which is alleged to have been created in favor of their property upon the property thus sold.

Exceptions were filed in the name of the heirs of *Bertrand Gravier*, against the joinder of the plaintiffs, and also against the joinder of the defendants in the same suit, to the petition, as not setting forth in a clear and definite manner the plaintiffs' cause of action, and to the petition as not showing any cause of action.

The District Judge decided on the last ground of exception, sustaining it and dismissing the plaintiffs' petition.

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The plaintiffs have appealed, and the case has been argued on the correctness of this decision of the District Judge.

We should have preferred to have had the whole case before us, on all the evidence, but we are obliged to act upon it as presented, and must endeavor to ascertain whether, in law, the plaintiffs' action can be maintained on the allegations of their petition. It is to be supposed that they have made the most of their case, and that the allegations do not fall short of the facts.

The plaintiffs allege, that the defendants have sold a servitude exclusively belonging to them, and they claim the price.

The law defines servitudes to be charges imposed on an estate for the use and utility of another estate. They accordingly terminate when things are in such a situation that the servitudes can be no longer used.

The legal principle of ownership involves that of exclusive dominion, and the right of enjoying and disposing of property independent of others, and under the sole restraint of the law. Servitudes are created by a dismemberment of the absolute right of ownership, which thereby becomes modified and imperfect.

The first presumption presented by the fact of ownership, is clearly in favor of the absolute, perfect right, and no adverse right can be recognized, unless it results from the presumptions which the law has established, or parties themselves have agreed as to its nature and purpose—and in this last case of the establishment of servitudes by covenant, certainty as to these relations is a requisite essential to their validity.

The statement of the plaintiffs' case places it under the laws in force in this State previous to the adoption of the Code of 1825, and the repeal of the Spanish laws. The Code made great innovations upon the law of servitudes, as it existed in the law of Spain and the Code of 1808, but it is by these laws alone that the rights of the plaintiffs are to be tested.

They allege that they are the owners of the estates fronting on New Levee street, in favor of which the servitude is claimed, having derived title by regular and authentic acts, respectively from one or more of the original owners of the batture. That in 1820, a compromise was made between the owners of the batture and the city, claiming also title to the property by which the former should own in full property that portion situate between New Levee street and Tchoupitoulas street, and should abandon to the city, the land outside of New Levee street, on the bank of the river, with the right of alluvion, &c. : that the express condition of said abandonment and compromise was, that the space, or land, and its increase, thus abandoned, should never be sold by the city—that no buildings should be erected thereon, but that the same should remain open and unenclosed for all time: that by the terms of said act of compromise, a real, or predial servitude was created and imposed upon all the property existing and accruing by alluvions between New Levee street and the river, for the benefit of the property reserved by the proprietors fronting on said street: that said servitude was in the nature of a right of way, and of perpetual front upon the river, was of great advantage to the property, in favor of which it was established, and greatly enhanced the price thereof, and that the purchasers of the front lots gave additional prices in consequence of the same, and consequently, have paid the value of said servitude of way, of front and

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of view, and are the owners of the same as well as of all other rights appertaining to said lots, which passed to them as an accessory, &c.: that this compromise received the sanction of the Legislature, but that subsequently a law was passed authorizing the parties to the act of compromise to extinguish this servitude and sell the property affected by it, and that accordingly the said property has been sold, under a certain other compromise, by which this servitude is undertaken to be extinguished—that to this second act of compromise the plaintiffs were not parties, though they, as owners of the lots to whom the servitude belongs, were the only representatives of the rights of the original owners.

This summary of the rights of the plaintiffs, as set forth in their petition, will enable us to test their claim to a share of the proceeds of the sale of this property, which is the object of the present suit.

Their right, it is said, is based upon the servitude which has been extinguished by the sale, and which formed a part of the property sold. They having affirmed the sale which was made without their consent, have a right to receive out of the proceeds a sum equivalent to the servitude, the abandonment of which completes the ownership, imperfect without it, which the purchasers have acquired under the sale.

The servitude, it is contended, is established by the following clauses in the act of compromise of the year 1820:

"Extracts from the Act of Compromise between the *City of New Orleans* and *Edward Livingston et als.*, passed before *H. Lacorgne*, Notary Public, on the 20th September, 1820.

"Which said appearers on the first part, in their own names and in their aforesaid capacities, and as possessors of the batture in front of the house of *Mary*, or representing the said possessors, being desirous of favoring the public with the use of the bank of the river in front of said batture, and for the purpose of the communication of streets which run thereto, have, by these presents, made irrevocable donation *inter vivos*, and in the best form in which a donation can be validate to the Mayor, Aldermen and inhabitants of New Orleans, represented by the Honorable *Joseph Roffignac*, Mayor of said City, here present, and accepting, and stipulating for the said Mayor, Aldermen and inhabitants.

"The donation is made with the express condition, a condition without which it should not have been made, to wit: That all the grounds which are the objects of said donations, shall remain *inalienable and not subject or liable to be seized for debt or otherwise*, in the hands of the corporation of New Orleans, who shall never, under any pretence whatever, sell, exchange, give, or otherwise dispose of them, in toto, or in part, nor employ them for, or to any other use, than the one to which they are naturally destined to; nor shall there be made or erected on them, any constructions or buildings, except, however, the case when the City Council shall think it convenient for general public interest to establish steam water-works on any part of the batture hereby given, which the said City Council shall think fit to choose for that purpose. It is, however, agreed, that the prohibition of erecting buildings or constructions, shall not be construed so as to prevent the Mayor and City Council of New Orleans from establishing wharves, to facilitate commerce, when they shall deem it convenient."

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Concurring in the views taken by *Mr. Justice Roost*, on the plaintiffs' rights, I desire to refer to some rules by which Courts ought to be guided in the recognition of servitudes of the character of those claimed by the plaintiffs.*

The Code of 1825, not only introduced innovations in the law of servitudes, but, with great latitude, it recognized classes of servitudes entirely inapplicable to the state of our society and our habits, and which can have no place in a new and sparsely settled country. The Code Napoleon, from which they are taken, found this class of servitudes established by ancient customs and long usages, and had to deal with them as facts under rights acquired.

It is, therefore, not unimportant to have before us those principles which jurisprudence has established concerning the creation of those changes which threaten to complicate the rights of property, produce much embarrassment in the law itself, and little real benefit to the interests of society.

In the establishment of servitudes by the agreement of parties, they ought to be declared and described with certainty as to the property in favor of which they are created, as to the property subjected, and as to the nature of the charge imposed. The want of certainty as to either of these essential points is fatal to the stipulation, by reason of the impossibility of ascertaining the true meaning and intent of the parties. In cases where the word servitude, or an equivalent word, is used, and a real right is created on one estate in favor of another, difficulties as to the intention of parties can rarely arise. The substance of the act will determine its import. But when the stipulation is simply in favor of the person, owner of the estate, or when from the purport of the act itself, the right is merely personal, it then becomes the duty of Courts to determine on the legal effect of the agreement under consideration, according to established principles of jurisprudence in such cases.

It is a general rule in the interpretation of acts purporting to create servitudes by covenant, that the construction ought to be in favor of the right of perfect ownership of the estate sought to be subjected, and in the sense favorable to a free and exclusive enjoyment of the rights of property. A consequence of this rule is, that it is incumbent on the party asserting a servitude to establish it affirmatively.

When a stipulation exists in favor of a person, the owner of an estate, the language might be such, or the whole tenor of the act be such, that a servitude might be fairly deduced, and, in a case of that kind, reference ought to be had to the respective condition of the estates, as affected by the servitude in their locality, uses, convenience, and value.

Applying these rules to the servitude asserted in the plaintiffs petition, I think the conclusion is inevitable, that no such servitude can be predicated of the title under which they claim.

I find no apt words in the connection in which they stand, and in the sense in which they are used, creating a servitude. Neither that nor any equivalent term is used.

Nor can it be inferred that it was the intention of the parties to establish a servitude.

"The donation is made with the express condition, a condition, without which it should not have been made, to wit, &c." The parties have thus expressed what they intended, which was to establish as a *sine qua non* condition to the validity and continuance of their stipulations, that the space in front

* Pardessus, *Treatise on Servitudes*, a work of great authority.

should be a public place, inalienable, and not liable to be seized—over which the Municipal government should not have the power which it has over ordinary public places. No buildings were to be erected on the space, except for steam water works. The public buildings which the former laws and usages of the land assigned to the banks of the river, such as markets, &c., were excluded from this space.

What the parties intended they certainly provided for, fully, clearly and specifically, and I find no ground for implying anything in this relation which was not provided for.

Had the owners of the riparian lots been few in number, and the lots sufficiently extensive for large dwelling houses, and the quarter of the city appropriate for private dwellings, there might have arisen some presumption of utility in favor of the servitude being created, notwithstanding the merely personal stipulation. But when we know the property to be at the great western landing, and exclusively used for stores and the appliances of the trade of the Western country, and was to be sold in small lots for stores, every such presumption stands repelled by the facts.

The original riparian owners were not proprietors in common. They each had a front on the river of so many feet, and there could be no use for the reservation of the servitude, either in their favor, or the purchasers of the lots which they acquired by the compromise, which should extend beyond each lot over the whole batture. The servitude claimed is indivisible, and its extinction would require the consent of all those in whose favor it was stipulated.

This fact was evidently foreseen, and as the increase of the alluvion was a matter of physical certainty in the course of time, and equally so the necessity for its being applied to the purposes of private ownership, the owners stipulated for their re-entry into their rights of property of the space they appropriated for the public use, in the event of the violation of the conditions before recited.

There does not appear to be any presumptions arising from the act itself, the nature or condition of the property in favor of the servitude asserted.

There is a total want of certainty as to the estates in whose favor the servitude is established. It is not stipulated in favor of the original riparian lots, nor the intermediate lots, between them and New Levee streets, nor the front lots owned by the plaintiffs.

It is not contended by the plaintiffs that the act of 1820 contains any other clauses relating to this matter, except those recited, and it is alleged that this right of the original owners passed by intermediate conveyances to the plaintiffs, as an accessory to their purchase of the front lots.

But that there is no presumption in favor of this ground, resulting from the situation of the plaintiffs' lots, fronting the river, or fronting a public place, and bounded by an intervening street, has been long since settled by the decisions of this Court, and our predecessors, after argument by the most eminent counsel. *Loverick et al, ata. The Mayor et al*, 18 Louisiana Rep. 330; *French v. The Carrollton Railroad*, 2 Annual Rep. 80; *Xigues v. Bujac et al*, 7 Annual Rep. p. —.

It has been urged in argument, that under the defendants' exceptions, every allegation of the petition must be taken as true, and that if the titles of the plaintiffs were in evidence, they might disclose a right of action, on their part, against the defendants.

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We understand that the exceptions have the effect of a demurrer, and admit only facts positively stated in the petition, and not the conclusions of law drawn from relevant facts stated. The exception is to nothing but what thus appears on the face of the petition, and if it does not contain sufficient grounds for the relief asked, the exception is well taken and must be sustained.

When an action is founded on a notarial act, an authenticated copy must be annexed to the petition, in order that it may be communicated to the defendant if he desire it. Code, 174.

The plaintiffs, instead of following this direction, have stated their right, it is to be presumed, according to the purport of their titles.

We cannot permit parties to derive any advantage from vague and uncertain allegations, when they relate to matters defined in written instruments. The cause of action, the object of the demand, and the nature of the title, must be stated with such certainty as to apprise the defendant of every fact necessary to put him on his just defence, and no party can be allowed to secure any advantage from obscurity in this respect. *Perkins v. Potts*, 7th Annual Rep.

The defendants might have prayed oyer of the plaintiffs' titles and had them made of record. They did not so ask—but the first error, if there be any in this respect, was committed by the plaintiffs in not annexing copies of their titles to their petition.

Benjamin & Micou submitted the following argument, in support of a petition for a re-hearing.

The great importance of this cause, must be our excuse for again soliciting the attention of the Court, after the very full examination, which it has, no doubt, received.

We will consider, in turn, the leading objections made by the Court, to the claim of servitude set up in the petition, and, in doing so, will, for the present, regard the act of compromise as a part of the petition.

1. The objection that the terms of the act are not sufficiently explicit to show the establishment of a servitude.

We admit, without hesitation, that no servitude of the kind claimed by us can result from mere implication, and that there must be a title, to create a conventional servitude; on the other hand, no law has been cited, nor is it assumed by the Court that the use of the word *servitude* is sacramental, and that a servitude may not be created without its use. The question is one of construction, and the construction depends upon authority. What language is sufficient to establish such a right, can best be determined by collecting together the rules and examples under them; and this task we will proceed to perform.

The Code lays down certain rules of interpretation applicable to such cases.

First: That the presumption, in cases of doubt as to the existence of the right, is in favor of the owner of the property.

Second: That if the right be stated to be for the benefit of an estate, it is esteemed a servitude, though not so called.

Third: That if the right be not stated to be for the benefit of the estate, then it is the duty of the Court to inquire "whether the right granted be of real advantage to the estate, or merely of personal convenience to the owner."

Fourth: That "if the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such right is a real servitude, *although it may not be so styled, &c.*" Code A. A. 749, 750, 751, 752.

These are mere rules of interpretation, and were, no doubt, intended rather as declaratory of the law, than as an innovation upon the rules previously in use. They are not embraced in the Code Napoleon, and seem to have been the result of the jurisprudence of Courts, and of the general doctrine of treatises upon the subject. Let us, therefore, see what degree of particularity and certainty has been demanded by authors and Courts.

The writer who seems most exacting, with respect to the terms necessary to establish a servitude, and whose treatise is quoted by the Court, is *Lalauré*; but let us see what *Merlin* says of him.

"*Lalauré*, livre 1, chap. 10, dit, que quand on constitue une servitude, il faut que le terrain qu'on veut asservir, soit certain et désigné, tant par la mesure que par ses tenans et aboutissans. Il cite, à cette occasion, la loi 6, D. de Servitutibus; mais cette loi ne dit rien de semblable, quoiqu'il le suppose ainsi, dans la traduction qu'il en a donnée; elle dit seulement qu'on peut établir ou remettre une servitude sur une certaine partie d'un fonds: Ad certam partem fundi servitus tam remitti quam constitui potest; c'est-à-dire, qu'on peut la remettre ou l'établir sur une certaine partie comme sur la totalité."

"Il suffit donc, pour la validité d'une servitude, que le fonds sur lequel on l'établit et l'espèce de la servitude soient désignés de manière à ne pas s'y méprendre, surtout dans les testamens, &c." *Merlin*, 31, Rep. 64.

And this seems to conform to the general text of the Institutes. "*Si quis velit vicino aliquod jus constituere, pactionibus atque stipulationibus id efficere debet.*" Inst. Just. L. 2, T. 3, § 4. Thus giving permission to owners to establish servitudes, as they grant any other right, by contract or stipulation without requiring any unusual particularity.

Pothier says, in general terms, that servitudes may be established, either by contract, or by donation, or will, and one of his instances is the case of a partition, where the share falling to one party is burthened with a servitude, in favor of the other portion of the property. 10 *Pothier*, p. 422.

Toullier says that servitudes are frequently established in partitions, where the right of view, passage, &c., is stipulated for the benefit of one and imposed upon the other of the houses: "*Dans tous les cas,*" he says, "*il importe de bien désigner le fonds auquel la servitude est imposée, et l'espèce de servitude, afin de prévenir les contestations trop fréquentes en cette matière.*" 3 *Toullier*, No. 601.

Duranton says nothing about the precise form of establishing servitudes, but that they may be constituted in any form of contract, as sale, exchange, or covenant between neighbors, and most frequently in partitions: 5 *Duranton*, No. 562; and he says they may be proved by any title constituting or acknowledging them, "*ou bien un titre reconnaissant,*" emanating from the owner of the subject property or his author. Ibid. No. 565.

Zacharie says, "*Si par suite des clauses d'une adjudication d'héritages vendues ou licitées en justice, des servitudes sont imposées à ses héritages, elles rentrent dans la classe des servitudes établies par convention.*" 2 *Zacharie*, 73.

Marcadé does not notice the form of acts necessary to constitute a servitude, but, in giving the rule for ascertaining whether a servitude has been created, he says, we must examine, first, if it is established between two estates, and second, if in truth a charge is imposed upon one estate for the benefit of another. 2 *Marcadé*, 605.

Domat prescribes no special form for this contract, but says, the servitude is governed by the title which establishes it. 1 *Domat*, 329.

Thus the rules laid down in the Code are shown to be substantially the same that have always been observed in the Civil Law. It could hardly be otherwise, for rules of interpretation of contracts are, in their nature, of universal application, and consequently do not differ very much in systems otherwise diverse.

Under the Common Law of England, no greater particularity is required. *Sugden* says, in substance, that if a covenant in a deed relate to the land, it passes with the land, and will be enforced, either at law or in equity, but gives no special form of words necessary to make such a covenant valid. 2 *Sugden*, Vend. p. 328 et seq.

In the case of the *Orleans Nav. Co. v. the Mayor*, 2 Mart. 33, *Judge Martin*, in his opinion, quotes the same text which we have copied above from the Institutes, "*Si quis velit, &c.,*" as the law of this State.

We may thence conclude, that the rules of interpretation of contracts, constituting servitudes, were the same in substance before the Code of 1825, as were embodied in that Code, and that no particular terms or phrases were required to establish such a right.

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Let us now present only a few instances of the application of these rules to particular cases; and first, the case from *Dalloz*, which we have already brought to the attention of the Court.

The owner of a block of buildings sold a part of them to *Haudard*, stating in the act, that the land before, and at the end of the buildings sold, so far as the vendor had any right to it, was embraced in the sale, but that the purchaser should not build upon said land, unless at the end and in the same line with the other buildings. Having afterwards sold the remaining buildings to other persons, the original owner released this covenant in favor of the successors of the vendee in the first sale. They attempted to build upon the space reserved, and were prohibited by the successors of the vendees in the second sale. The Court of Cassation decided (although the word was not found in the deed) that the stipulation not to build, imported a servitude in favor of the buildings reserved from the first sale, which passed with those buildings to the purchasers in the second sale; that the covenant could not be released by the original owner after he had ceased to be the proprietor of the property to which the right attached. The injunction was, therefore, maintained. *Dalloz*, 1825, 1, 84.

Here, as in the present case, the servitude was created without the use of the word; it was held to attach to the property which, at the time it was made, belonged to the party; to have passed under the general term of rights, ways, and privileges, to the purchasers of that property. In that case, the same attempt was made that is made in this; that is, the original owner attempted to release the servitude after he had ceased to be the owner of the *terre dominante*, and it was decided that he had no such right.

But the case most precisely analogous to the present, is one decided by *Chancellor Walworth*, of New York.

Bostwick, the owner of a lot of land in the village of Auburn, was also the owner of a triangular piece of ground on the opposite side of the street. Having sold the first lot to *Miller*, it was agreed, as a part of the bargain, that the triangular piece of ground should be deemed *public property*, so that neither *Bostwick*, nor any person claiming under him, should ever erect any buildings, or exercise any other act of ownership thereon. Two deeds were prepared and executed, one simply conveying the lot sold, the other a bond, under a penalty, containing the above agreement respecting the triangle. Afterwards, *Miller* sold to *Hills* a part of the property so purchased from *Bostwick*. The trustees of a church, having a front on the triangle, desiring to extend the church a few feet upon the ground, applied to the parties for permission to do so. The executors of *Bostwick*, the original owner, and the first purchaser, *Miller*, gave their permission, but *Hills*, the purchaser from *Miller*, refused. The trustees persisting in building, *Hills* enjoined.

Here is a case which, in every feature, corresponds with our own. There was the dedication to public use and the interposition of a street between the *terre dominante* and the *terre serviente*. There was no servitude or easement created by name; and while, in our case, the right in question appears in the title to the land, in the New York case it was evidenced by a distinct deed in the form of a personal covenant.

Chancellor Walworth decided: 1st. That the two deeds were to be regarded as one; thus connecting the right with the property to which it belonged; then proceeding to consider the nature of the right secured by the deed, he says: "The object of the bond was not to secure a personal right to *Miller* to have the triangle kept open, without reference to the benefit he expected to receive thereby as the owner of the lands conveyed to him by the deed. It was an easement or privilege annexed to those lands; and if he had reconveyed the whole of the land to *Bostwick*, his right to recover for a breach of the condition of the bond, would have become extinct. 3 Kent's *Comm.* 449; *Ersk. Princ.* 218, 227. The right thus granted was the servitude *non officiendi luminibus vel prospectui* of the Roman law, or the right of the owner of the lands to which it is appurtenant, to restrain the owner of the servient tenement from making any erection thereon which may injure the light or prospect of the dominant tenement, or any part thereof. Rights of this description, denominated predial servitudes in the civil law, and by our law termed easements, are attached to the estate and not to the person of the owner of the dominant tenement; and they follow that estate into the hands of the assignee thereof. So,

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on the other hand, they are a charge upon the estate, or property of the servient tenement, and follow it into the hands of any person to whom such tenement, or any part thereof, is subsequently conveyed. 3 Kent's *Comm.* 420; *Code Nap.* art. 686; *Inst. Civil Law of Spain*, 189. As the right is annexed to the estate, for the benefit of which the easement, or servitude, is created, the right is not destroyed by a division of the estate to which it is appurtenant. And the owner, or assignee, of any portion of that estate may claim the right so far as it is applicable to his part of the property, provided the right can be enjoyed as to the separate parcels, without any additional charge, or burthen, to the proprietor of the servient tenement. The same principle is applied by the courts of law to covenants which run with the land. And the assignee of the whole estate, in a part of the premises, may recover in his own name, as such assignee, for a breach of the covenant as to that part, provided the covenant is in its nature divisible. Shep. Touchs. 199; *Conan v. Kemise*, Sir W. Jones's Rep. 245. In the language of a distinguished Common Law Judge, 'they stick so fast to the thing on which they wait, that they follow every particle of it.' See Wilmot's Opin. 346. As the right to have the triangular lot kept open for the benefit of the dominant tenement, was appurtenant to every part of the premises conveyed to *Miller* to which that privilege could be of any possible use, *Hills*, by the purchase of that portion of those premises which lies directly opposite the triangle, became, in equity at least, the assignee of that privilege or easement, *pro tanto*.

"*Miller* admits, in his answer, that he informed the complainant of the right he had secured, by the bond of *Bostwick*, to prevent the erection of any building on the triangular piece of land; and that this information was given pending the negotiations for a sale to the complainant, as commending the purchase of that part of the premises which was subsequently bought by him. If the privilege was of no value to that part of the property, the mention of the fact of the bond would have been no commendation; and if it was calculated to enhance the value of the property in the opinion of the purchaser, it would be inequitable to permit the seller to release the right he had secured by the bond, after he had, by that means, induced the complainant to become the buyer. If such a privilege did increase the value of the property, or render its possession more desirable, either in reference to its present or future use for village lots, the legal presumption is, that the purchaser took that privilege into the account in deciding upon the expediency of taking the property at the price he concluded to give. The complainant is, therefore, equitably entitled to the benefit of the stipulations in the bond, so far as is necessary to secure him the privilege, as appurtenant to that part of the premises. As against the present, or any future owners of the land, still held by *Miller*, the trustees of the Baptist church have secured the right to extend their building on to the triangle to the extent of twelve feet. But as they made that arrangement with the full knowledge of the equitable claim of *Hills*, they cannot, without his consent, be permitted to erect a building on any part of the triangle, to the injury of his part of the adjacent property, held under the deed from *Bostwick* to *Miller*.

"From the answer of the defendants, and from a view of the several localities about this triangle, as exhibited by the maps, I confess it appears to me that the complainant is a little unreasonable in refusing this privilege to a respectable congregation of christians, who wish to enlarge their church by extending it only a few feet into this vacant lot; unless, indeed, the object of this suit is to settle his rights as to the future occupation of the residue of the triangle. But the same principle which would authorize this Court to disregard his rights for this object, would render it equally proper for the Court to disregard them if the object of the defendants was to erect a 'Hall of Science,' or a Turkish Mosque. And for aught I can know judicially, the contemplated building may be as offensive to the complainant as an edifice of either of the descriptions supposed would unquestionably be to his pious neighbors who now wish to worship there. However unreasonable I may suppose the complainant to be in this instance, if he has rights, they are guaranteed to him by the constitution, and he cannot be deprived of them, even for a public benefit, except by due course of law, and upon receiving a just compensation therefor. The Legislature has not deemed it expedient to authorize the taking of private property for such an object; and until they do so, he cannot be deprived of his rights without his consent."

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This doctrine is strictly in accordance with that laid down in the case of the *Trustees of Watertown v. Cowen*, 4 Paige's Ch. Rep. 514, the circumstances of which were the same, except that the deed contained no dedication to public use. A similar covenant, not to build upon a public square, in front of premises sold, although not so named, was decided to be a privilege or easement which passed with the land to which it was attached. And the same doctrine is found in Sugden on *Vendors*. "There is no objection," says this author, "in point of law, to the owner of an area surrounded by houses, contracting that it shall never be built upon," and he maintains most decidedly that such covenants run with the estates, to which, and in favor of which they are attached, and will be enforced, both at law and in Equity. 2 Sugden on *Ven.* 329.

Perhaps we owe an apology to the Court, for again pressing these authorities upon its attention. Let it be found in the fact, that although they appear to be directly in point, they are not noticed in the opinions which have been pronounced, and we are left to conjecture to ascertain how they failed to produce any effect upon the mind of the Court.

We have thus labored to show, both by precept and example, that there is no peculiar rule of construction applicable to the establishment of servitudes. They are governed by the same rules with other contracts. The law pays no regard to mere names, because words are not things. It looks to the substance of the act, and if the meaning be apparent and lawful, effect is given to that meaning. In other words, we come back to the very rules contained in the Code of 1825. A servitude must have a title, therefore it is not presumed; but if a burthen is granted upon an estate, then the Court must look into the character of that burthen, and if it be in the nature of a servitude, and for the advantage of an adjoining estate, the Court has no power to declare the agreement null, but must enforce it as a servitude.

In the opinion of the Chief Justice, it is said, that the present case is to be governed by the laws in force prior to the new Code and the repeal of the Spanish laws, and that the Code of 1825 introduced innovations in the law of servitudes, and, with great latitude recognized classes of servitudes inapplicable to the state of our society and habits. But we are not informed in what particular this remark applies to our case. It is true that the chapter on servitudes was greatly elaborated in the Code of 1825, but we must venture to express a doubt, whether that Code allowed a greater extension of such rights than was allowed by the Code of 1808. The Art. 705, of the present Code, is the same with Art. 49, p. 138, of the Code of 1808, and is a translation of the corresponding Article in the Code Napoleon. It gives to proprietors the right to "establish on their estates, or in favor of their estates *such services as they deem proper* ; provided, nevertheless, that the services be not imposed on the person, or in favor of the person, but only on an estate, or in favor of an estate, and provided, moreover, that said services imply nothing contrary to public order."

Whether there is anything in the servitude, now claimed by us, contrary to public order, is a question for consideration hereafter; but with this text of the Code in force ever since 1808, it seems difficult to maintain that any class of servitudes, permitted by the Code of 1825, were excluded by the law previously in force. But even if this class of servitudes be extended by the new Code, that extension cannot affect the validity of those which were recognized by both Codes. Of these, the servitude of not building, is one of the most prominent. It is a servitude well known to the Roman law and recognized and regulated in many texts. In the Code Napoleon, it is mentioned as an example of the kinds of servitudes that may be established by contract, No. 689, and the Art. 52, p. 138, of the Code of 1808, is only a translation of the corresponding article, and thus adopts the same example. The article is repeated without any change in the Code of 1825.

Let us now consider whether the principles of law, thus collected from the texts, and the decisions, are not applicable to the case before the Court; and for this purpose, we treat the act of 1820 as if it formed a part of our petition.

That act has been decided by your Honors, to be an act of compromise and partition. The whole property to which it referred was embraced between Tchoupitoulas street and the river, and was bounded above by Montgomery's line and below by Common street. A plan was annexed and referred to, in which the portion assigned to the City, and that reserved to the proprietors, is

distinctly marked—all between the Tchoupitoulas street and the Levee (excepting the cross streets) being reserved to the proprietors, and all between the Levee and the river being abandoned to the city.

It is impossible, therefore, to say that there is any uncertainty as to the estates upon which, and in favor of which, the alleged servitude was reserved; the two parts are as distinctly designated as they could be in an act of sale, and certainly a description sufficient to pass the absolute title, is sufficient to support the establishment of a servitude. If, therefore, in an act of partition, a service or burthen be imposed upon the share of one of the partakers, and if it be of a character to increase the value of the other share, it is a principle of law, which we have established beyond the possibility of doubt, that it is presumed to be a real servitude, although it be not so called.

The only question that remains, then, is, whether the character of the burthen is not such as to correspond with the legal definition of a servitude.

The abandonment of title by the front proprietors of all the property between the New Levee and the river, was made and accepted upon the express condition that the property should never be sold; that it should be kept open for public use, and that no buildings should ever be erected upon it. It is clear that this act gives the title or ownership to the city, and equally clear that it does not give the full and absolute enjoyment of the estate granted. The nature of the restrictions imposed by the act must, therefore, be considered.

The dedication to the public use, and the prohibition of sale, seem to us to be a mere inducement to the leading object of preventing improvements and buildings. If the space remained forever open and unimproved, the public would have the free use of it from its position on the margin of a great river. The prohibition of sale could have no other possible motive than to secure the perpetuity of the other conditions, because if those conditions were observed, it would be a matter of absolute indifference to the front proprietors, where the naked and barren title might vest. The three conditions, therefore, concur in one leading and prominent object, and that object is to keep open and unimproved, the space between the river and the estate, which the compromise secured to the front proprietors. So far from there being any repugnancy in these conditions, they are perfectly accordant with and auxiliary to each other.

The prominent burthen, thus imposed upon the estate accepted by the City, is the obligation not to build. Could such an obligation be of any possible benefit to the persons who demanded the stipulation, or their heirs, independently of any supposed advantage to the property, of which they were the owners? That it could not be, is a self-evident proposition, and it would be disrespectful to the Court to support it by argument.

Does not any advantage that might result from this prohibition inure to the property retained by the front proprietors?

As the Court seems to answer this question in the negative, we will consider the objections stated in the opinions pronounced.

The Chief Justice remarks, that the right of prospect, which the stipulation was calculated to secure, could only be of advantage to private dwellings, and as the property reserved was only adapted, from its position, to stores and shops suitable to the Western commerce, the servitude of view could be of no advantage to it.

We must first reply, that this objection travels beyond the limits of the demurrer, and negatives one of the facts alleged in the petition. To what purpose the lots reserved were, or are adapted, is not stated in the petition, and to assume that they are not suitable for private dwellings, is to go out of the record, and oppose the personal knowledge, or opinion, of the Judge to an allegation in the petition. It is charged in the petition, that the burthen imposed upon the batture, did increase the value of the front property, and that, in consequence thereof, the plaintiffs paid for it a much higher price than it would have commanded if the burthen had not been imposed. This is a fact—not a conclusion of law. It must, therefore, be admitted to be true on the demurrer. If it is not admitted, we must, according to all known rules of practice, have an opportunity of proving it.

But we join issue with the Court as to the correctness of the opinion thus expressed.

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There are other considerations besides the mere pleasure of an agreeable and extensive prospect. The front on a wider street, or on a river, may add to the market value of stores, shops and warehouses. It affords to them greater facility of access, and, in the present case, insured a direct intercourse between each house that might be erected on the front, with each and every part of one of the most important public landings in the United States, and, perhaps, in the world. It enabled the tenants of these stores and warehouses, to attract their customers by exhibiting their signs, and showing the front of their establishments, so as to be visible from the floating hotels and floating warehouses, borne upon the bosom of the greatest of rivers, from the sea and from the country, with their freight of wealth, and their crowds of merchants and planters. The act of 1820 gave a promise, that this front and view should remain forever undisturbed, and gave an assurance to the occupants of front houses that no competitor should ever interpose his booth, or erect his stall, or his shop, between them and the landing place of the customer.

The increase of the money value of property, is as legitimate an object for the acquisition of the servitude of view, over an adjoining estate, as the mere pleasure of a prospect; and we think that no man can doubt that the stipulation, in the act, was intended to enhance, and did greatly enhance, the value of the front lots.

The Court refuses to recognize this advantage, because it is not expressed in the act as a condition or motive, and because another motive is expressed. That motive is the desire of "favoring the public with the use of the bank of the river."

To this we answer, in the first place, that it is an elementary principle of law, that the consideration of a contract need not be expressed on its face—Code 1888—and that the recital of a consideration which has no existence, will not affect the validity of the contract, provided there be another not expressed, and the true motive be not unlawful. *Pickersgill v. Brown*, 7 Annual; 6 Toullier. It follows, that the expression of one motive, whether truly or falsely, does not exclude the existence of another; and the Court is at liberty to search for the true object, in the whole tenor of the act, in the character of the stipulations, and even in circumstances not noticed in the act itself. Thus, in the case from *Dallos*, 1825, already cited, no motive was expressed for the stipulation not to build, yet the Court found no difficulty in arriving at the conclusion that it was a stipulation for the benefit of that part of the property which the vendor retained for himself. In the case of *Hille v. Miller*, quoted above at large, the stipulation was contained in an ordinary penal bond, and, in form, was a mere personal obligation; but, to arrive at the true intent of the parties, the Court took notice of the deed of sale, executed on the same day, so as to sustain the stipulation contained in the bond, and find for it a lawful cause, in the advantage it conferred upon a neighboring property. There could be no better illustration of this familiar principle, that the decision of this Court in the case of *Delabigarre*, where your Honors held the motive expressed, and the form of the contract, a mere simulation; but yet held the act valid and effectual, because it contained lawful stipulations of a different character than those expressed. It was not a donation, which it pretended to be—yet it was a good compromise, which it did not purport to be.

Hence it is immaterial whether the motive expressed was true or false; but certainly the fierce litigation that had been carried on for twenty years between the public and the claimants of this property, would suggest the idea that the claimants were actuated by any other motive than disinterested generosity towards the public. The act bears, in all its features, the impress of a hard close bargain, in which each party was endeavoring to obtain for itself the best possible terms, and the thin disguise of the name, Donation, and of a desire to favor the public, conceals from no one its true character.

But let us give all reasonable credit to the front proprietors—let us admit that they were prompted by public spirit to dedicate the batture to public use. Still this is not the only apparent motive. If there had been nothing but generosity to the public, the gift would have been free and untrammelled. It would have been more liberal to let the public do as it pleased with its own. All parties, no doubt, anticipated that a time would come when, by the gradual receding of the river, room would be left for new ranges of squares and houses,

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and it would have been more in consonance with pure generosity to leave to the public the privilege, at its discretion, hereafter to devote the space to private uses. Instead of this, we find a stipulation preventing forever the sale and change of destination, and prohibiting forever the improvement of the property.

In the case of *Delabigarre*, the Court make free use of the maxim that no one is presumed to give. The rule is founded in experience of human character and conduct. Men are not apt to be wholly liberal; their gifts are often made with a view to indirect profit. The usual motive to the dedication of streets and public places, is the enhanced value of the remaining property. The owners of the land on which the city of Washington now stands, abandoned about two-thirds of the soil to the government, or the public; but the munificence of the gift does not conceal the fact, that the remaining third acquired a value greater than the whole possessed before it was adopted as the site of a capital.

When we find the proprietors of 1820, binding in fetters, intended to be perpetual, the gift they were making to the public, can we be far from the truth in assuming that these fetters were coined in the mint of self-interest?

The Court objects to the servitude claimed, that it is of a new and unusual character; that the law recognizes no such servitude as the right of front to a river, and that the creation of new servitudes is not to be encouraged.

We respectfully submit that this confounds the advantage resulting from a servitude with the burthen which it imposes upon the subject estate. The servitude imposed is that of not building—*de non ædificandi*—one of the servitudes best known to the law, and the one selected by the Codes as an example. It is not left to inference, but is expressed in formal words. That servitude is always established in order that another and adjacent estate, the *terre dominante*, may enjoy a better light, or a better prospect. In naming the servitude, we distinguish between the two estates. If named with reference to one, it is the servitude *de non ædificandi*, with reference to the other, the servitude *ne luminibus officiatur*, or *ne prospectui offendatur*. § L. 8, T. 2. b. 15. The mention of either name includes the other, because there must be an estate to enjoy the prospect and another to be kept in such a condition as not to obstruct the view. If, from the natural position of the two estates, a servitude of this character happens to secure to the *terre dominante* a prospect of a river, that prospect is the result of the burthen imposed on the *terre serviente*. It may well be that the view of the river was the only reason for imposing the burthen of not building. We are not inventing a new servitude by claiming the right of front to the river, but are merely stating the advantage which one of the most familiar servitudes confers upon the property of the plaintiffs.

In one of the opinions it is said, that at the time of the compromise in 1820, the land, now owned by the plaintiffs, was a mere sand bank, and the intention to erect buildings upon it, is not mentioned in the act, and then quotes *Lalauré* that, "urban servitudes include all those that are due to buildings wherever situated."

Are we to understand from this that urban servitudes cannot be stipulated, without stating in the act, that buildings are to be erected to enjoy it? It would seem that the situation of the property, in the centre of a city, would sufficiently show that buildings are to be erected upon it. The stipulation, therefore, implies that buildings are to be erected, the tenants of which may enjoy the servitude. The fact that the servitude *may* be of benefit to buildings afterwards erected, adds to the value of the property for whose use it is stipulated, and therefore is a legitimate motive for the stipulation. In the opinion of *Chan. Walworth*, quoted above, it is so stated, and we cannot believe that the Court differs from him on this point.

But in this, as in many other instances, we submit, that the Court is travelling beyond the demurrer. If the Court intends to draw any conclusion from the condition of the property in 1820, its condition ought to be proved, not assumed from the recollection of the Judge. There is no allegation in the petition touching the condition of the property, and in a demurrer nothing can be considered beyond the petition.

It would seem, then, that every requisite of the law has been complied with in the manner of creating this servitude. The law requires only that degree of particularity that is used in other contracts. In the present case there is no

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ambiguity in the language imposing the servitude, or describing the estate upon which it is imposed. The servitude is that of never building; the property is that embraced between the Levee and the river, bounded above by Montgomery's line, and below by Common street. All this is expressed in the deed, in language too plain to admit of construction or interpretation. The only question in the cause is, for whose benefit was this burthen imposed? Was it for the personal convenience of the original proprietors? or was it for the purpose of adding to the value of the adjacent property which they retained? This is a question of construction. How does the law answer it? What did the Court of Cassation say in the case of *Huudard*? What did *Chancellor Walworth* say in the case of *Hills*? What does *Sugden* say? What does the Code say with regard to the interpretation of such stipulations? All join in the common answer—if the burthen imposed be of a nature to confer a benefit upon the neighboring estate, it is a prædial servitude.

Let us add to this a single reflection. That the stipulation, never to build, was a serious burthen upon this property, none will dispute. If that burthen was imposed for the benefit of the adjacent property, it is valid—if for the personal convenience, or to gratify the fancy of the front proprietors, without any profit to their estates, it is invalid and null. Our construction gives effect to the language of the contract, that of the Court annuls it.

II. The objection that the servitude claimed is against public policy.

If the servitude is not created by the terms of the compromise, it is hardly necessary to inquire whether, if created, it would be contrary to public policy. The use of the latter argument would be supererogatory. Yet, as the Court has thought proper to make the objection, it is our duty to consider it.

In the opinion of *Mr. Justice Root*, the objection is thus stated—"It is true that the servitude of view is sometimes considered in law as including the servitude of prospect, as well as that of light; but we greatly doubt whether a servitude of prospect can be established in our modern cities, where the houses are contiguous, and no open spaces, save the streets and public squares, are habitually left, except, perhaps, in case of adjoining lots; and if it can, the great inconvenience which would result from it, makes it the duty of Courts not to recognize it, without an express constitution of it, by title, in favor of buildings erected, or to be erected."

His Honor recognizes the existence of a servitude, or a right so like it, as to amount to the same thing, over the public streets in favor of the lots fronting on them. He says he agrees with *Dalloz* in the opinion, that if the Sovereign sell the street, the buyer cannot use it so as to deprive the front proprietors of the right of way. If then this servitude may exist, by implication, over the streets, may it not be established, by express contract, over a public square? We yield to the cases already decided, that no such servitude will be held to extend beyond a street, by mere inference; but if it be so expressed in the deed, is there any policy of law which forbids the extension of the servitude of prospect over a public square? So long as it remains public, the prospect is enjoyed without any stipulation. Is it possible to contend that it is against public policy to stipulate for the continued enjoyment of that which is constantly enjoyed without stipulation? The city of New York, and most other cities in the world, afford numerous instances of public squares, or parks, kept open for the avowed purpose of affording a better prospect to the surrounding houses; and so kept open by express covenant with the proprietors of those houses.

If a public square can thus be consecrated to the special use of the surrounding property, why may not the margin of a great river be kept open for the peculiar benefit of the property near it? Public squares and wide open walks on the margin of rivers, or of the ports of cities, have always been regarded as public benefits. If not indispensable for the health of the inhabitants, they contribute, in an eminent degree, to their comfort and pleasures. The mere dedication of such places to public use, leaves the change of that dedication subject to the legislative or municipal will. So your Honors have decided, and we accept the decision as the proper interpretation of the law. But if, in addition to the public dedication, private rights be granted, tending to secure the perpetuation of a public convenience, those rights cannot be held to conflict with public policy. We have already brought to the attention of the Court numerous authorities from the French books, showing that private servitudes

may be established over public places, provided they are, in their nature, consistent with the public use for which the property is principally intended. 3 Toullier, § 478, 481, 482, 483; 2 Zach. 72; 5 Duranton, § 297, 298; 12 Dalloz, *Jur. Gen.* 10; Dalloz, 1828, 1, 124; Dalloz, 1830, 2, 25; and the Court has assented to the proposition in the case of streets. What distinction can be made between streets and squares? And what distinction between squares and the banks of rivers? In either case the servitude claimed is in aid of a public advantage, because its existence renders it more difficult to put an end to the advantage secured to the public. The stipulation of such a servitude, so far from being repugnant to the public use, is in aid of the main object of the dedication, and is, therefore, eminently entitled to favor.

But, in the present case, we submit that the question of policy has been decided by a higher power than the judicial. The act of 1820 tenders the use of this property to the public, but couples it with the express condition, without which the dedication would not have been made, that its destination should never be changed, and that the property should never be covered with buildings. The Legislature, in 1836, accepted this offer in the most formal terms. It declared, that no use should ever be made of the Batture inconsistent with the terms of the compromise. It, therefore, adopted the terms of that instrument, and gave them the sanction of a law.

Can the Court decide that a law is impolitic, and refuse, for that reason, to enforce it? The law itself says this cannot be done. The distinction between odious laws and those entitled to favor, is abolished, and judges are prohibited from departing from the plain letter of a statute to find its supposed policy. These texts seem, to us, to place it beyond the power of Courts to object to the policy of things which the Legislature has sanctioned. The legislative sanction makes them a part of the law, and judges must respect them as such.

A text of the Partidas enumerates, among those things which could not be burdened with servitudes, public places, sacred property, &c. If, while this law was in force, a dedication were made to the public of a property, with the reservation of a private servitude, the dedication would require the special acceptance of the sovereign, before it would become binding on the donor. If the sovereign accepted, the same power which enacted the law would permit an exception to it. If the sovereign refused to accept, the right of property would revert to the donor. This seems to be the plain view of the subject, and is more consistent with justice and fair dealing than to say that in such a case the sovereign would accept the dedication and annul the condition. The sovereign will be represented, in the case now before the Court, by the Legislature and by the Municipal Councils. The latter gave their consent to the terms of the compromise by becoming parties to the act; the former by adopting and enacting its stipulations into a law, in 1836.

III. The control of the Legislature over public places.

The general proposition that the Legislature has power to change the destination of public places, we have again and again admitted; but like all other general propositions, it has its exceptions. The exception, claimed in this case, is, that if the change of destination cannot be made without violating private rights, then the power, even of the sovereign, is insufficient, without compensation to make such change. This exception is recognized in the very authorities quoted by your Honors, in support of the general rule. In the case of *De Armas v. The Mayor*, 5 La. Rep, *Judge Martin* does not even concede the general proposition. He considers the point in pages 158 et seq., of the Reports, and concludes that such places are inalienable. On page 170, he says: "Upon the whole, it appears to me that the appellees' counsel has failed to establish any of the propositions he relied on, which have any bearing in this case, viz:

"I. That the space marked on the plan is not a quay.

"II. That the King of Spain could alienate public places, &c."

This opinion, although a dissenting one, is the most lauded of all those pronounced by this eminent Judge. Your Honors gave it your sanction in the case of *Hopkins*, 13 La. 330, and it has already been adopted by the Supreme Court of the United States, in the case of the *City of New Orleans*, 10 Peters, 723.

It is true that *Judge Martin* held, that the place in question being a part of the *Quai*, "could not be claimed by an individual in a civil action," but he

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came to that conclusion because the place was *hors de commerce*, and could not be alienated, even by the King.

But the point is more critically examined and the distinction more clearly laid down in the case of *New Orleans*, in 10th Peters. *Mr. Justice McLean*, after quoting the opinion of *Judge Martin*, proceeds, p. 723. "The power of appropriating private property to public purposes is an incident of sovereignty. And it may be, that by the exercise of this power under extraordinary emergencies, property which had been dedicated to public use, but the enjoyment of which was principally limited to a local community, might be taken for higher and national purposes, and disposed of on the same principles which subject private property to be taken.

"In a government of limited and specified powers like ours, such a power can be exercised only in the mode provided by law; but in an arbitrary government, the will of the sovereign supersedes all rule on the subject."

After quoting the Spanish laws, the Judge proceeds, p. 726: "A faithful observance of these laws would have preserved the rights of the City, as to the common, free from invasion. No law was cited in the argument which showed the power of the king of Spain to alienate land which had been dedicated to the public use; and it is clear that the exercise of such a power would have violated the public law, which is understood to have limited the exercise of the sovereign power in this respect.

"The king of Spain, like the king of France, had the power to give permission to construct buildings on grounds dedicated to public use, without injury to the public rights; but this does not show that either sovereign had the power to alien such lands."

P. 730. "There can be no difference, in principle, between ground dedicated as a quay to public use, and the streets and alleys of a town: and as to the streets, it may be asked, whether the king could rightfully have granted them. This will not be pretended by any one. And it is believed, that the public right to a common, is equally beyond the power of the sovereign to grant; unless he dispose of it under the power to appropriate property to the national use; and then compensation must be paid."

Here we are led to a clear understanding of the proposition. A city may acquire a right to a common, a quay, or a street, which the sovereign cannot destroy, because the property is *hors de commerce*. In such case the joint assent of the city and of the sovereign is necessary to a change of destination. Why is it necessary? The reason obviously is, that in addition to those general rights, which the whole world may exercise over the property, the city has a peculiar and special interest, over which the law throws the shield of its protection. But if an individual have the like special rights over public property, why does not the same rule apply. If, for instance, the owners of dwellings fronting on the celebrated Boston Commons, are assured by their titles, emanating from the original owner of the soil, that their property shall forever enjoy the prospect over the Common, it is obvious that they possess a peculiar and special interest, in addition to the rights which all others possess. The stranger may walk through the Park, the surrounding proprietors enjoy its view, while sitting at their firesides, and the value of their estates is greatly enhanced by this privilege. Their right is, therefore, as sacred as the right of the City contradistinguished from the State, and can, no more than the rights of the City, be divested without compensation.

Judge Martin, in his opinion already quoted (171), gives instances of the legitimate exercise of the sovereign power. "I do not," he says, "wish to be understood to say that natural, or other events, may not render a public place no longer susceptible of the use for which it was dedicated; nor that, when this is the case, it does not lose the legal character which the dedication and consequent use had given it." He then cites the case of the town of Aigues-Mortes, which had ceased to be a sea-port by the receding of the sea from its walls, and of the town of Bath, on Tar river, which being destroyed by conflagration, *all the lots were re-purchased* by the original owner, and the legislature then repealed the act making it a town. In the first case, the use of the port had ceased from a natural event. In the second, *there was no longer any private right* to interfere with the change of destination. The original owner, who had once sold a part of the lots, had repurchased them all; there was conse-

quently no public to enjoy the property, and no private right whatever was violated by the legislative permission to reduce it once more to the condition of a plantation.

These examples are instructive. They lead us to the true principle governing the case. In no government of laws can private property be taken for public use without compensation. If either individuals, or a limited community, have lawfully acquired a special servitude upon a public place, their rights could no more be divested, without compensation, than could individuals be turned out of their houses to create a public place, without indemnity. The right to enjoy the prospect over a public square is a property, as well defined and as clearly recognized as the title to the tenement from the windows of which the view is enjoyed, and both come under the sacred cover of the law.

The true proposition to be deduced from the cases cited by the Court, in our humble opinion, is not that the sovereign has an unlimited and arbitrary right to change the destination of public places, but that such change of destination cannot take place without the sanction of the sovereign. To the public the use has been granted; consequently that use cannot be divested without the consent of the public to which it belongs, and the public gives its assent by the expression of the sovereign will. So if a city has acquired a special right, in addition to that of the public, the city must also consent; and if an individual have a like right, his consent is necessary. This is the true theory, and is the only one that can properly be deduced from the very celebrated cases quoted by the Court.

Over the rights of local communities, and of individuals, the right of expropriation in due course of law, and upon indemnity being paid, presides as a conservative attribute, which does not destroy the right of the citizen, but makes it subservient, upon equitable terms, to the public weal. To this right *Chancellor Walworth* referred in his opinion; to this the French Courts, in the numerous cases to which we have heretofore called the attention of your honors, refer; and your honors have yourselves recognized its application to the case of streets. Why, then, does it not apply to the case of any other public space, over which surrounding houses have a view, or to an open mall on the bank of a river?

Lest we be misunderstood, we repeat, that we do not question the ruling of the Court in the case of *Hopkins*, or in the case of *Annunciation Square*. In both these cases it was decided that the parties claiming servitudes had no title; or in other words, that the mere fact of having a front commanding a view of a square or quay, did not create a servitude. But if *Livaudais* had inserted in the title of the proprietors, whose lots fronted the square, an express agreement that it should never be used for any other purpose than a public and open place, it would be a libel upon the intelligence of your honors to say that you would have permitted even the legislature to divest this servitude without indemnity.

If there be no private servitude over the public place, there is no right to be compensated, and the subject falls under the absolute discretion of the sovereign, because the sovereign is the only representative of the public; but when such servitudes had a lawful existence, even the kings of France and Spain respected them. Still more sacred will they be held in a constitutional government, where the higher law is placed above and beyond even legislative power. This principle was found in the Code of 1808, and was incorporated in the constitution of 1845 and 1852, as well as in the Code of 1825.

The inference which one of your honors seems to deduce from the power of the sovereign to change the destination of public places, which is asserted as if existing without limit or qualification, is, that the reservation of the conditions in the act of 1820 was a mere nullity. His Honor assumes that it would have been competent for the Legislature to have accepted the act on the day after it was passed, and on the next day to have annulled and set aside the conditions which formed the inducement and the consideration of the grant. If it be admitted that the act of 1820 was a contract, to which the State acceded, such a result could not ensue. Even governments are bound by their contracts, and especially in our Union are the States so bound. The great compact, which by common consent, the whole people of the United States have adopted, and which is placed beyond either legislative or congressional control, prohibits all

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laws impairing the obligation of contracts. It is true that the observance of contracts by States cannot be compelled by judicial power, because that would be to array the Courts and officers against the government which created them. But the public faith and national honor are the guardians of State contracts, and the government which refuses to perform its own contracts brings upon it the scorn of mankind.

The acceptance of the act of 1820 is a contract, by which the faith of the State was pledged to the observance of the terms and conditions contained in that act. It is true that the accepting act does not appear in the shape of an express contract; but it is found in the amended charter of the City, which was one of the parties to the act of 1820, and prohibits the City from ever attempting to violate the conditions on which it had accepted the batture.

If this be regarded as an acceptance by the State, of the dedication tendered by the act, there is an acceptance upon the conditions expressed; if it is not an acceptance, then the rights of the public have never attached to the property; they are inchoate merely, and the necessary consequence of annulling the conditions would be to refuse the dedication that is tendered in the act. The agreement was either null *in toto*, or wholly good. There is no middle course, consistent either with law or good faith; both forbid the State to accept so much of the act as is supposed to be beneficial, and discard all that it contains tending to create a burthen.

Nor has the State ever claimed or attempted to exercise any such power. The course of legislation on the subject shows that the State is unwilling to attempt a course so contrary to every sentiment of justice and of honor. In the act of 1850, no absolute power is given to the city to violate the compromise which the Legislature had ratified in 1836. The language of the law is, that in the event of an agreement between the original proprietors and the city, the property may be sold. Here the right of the proprietors to indemnity, when their property is to be taken for public purposes, is distinctly recognized, for the legislative permission is granted only on the condition of an agreement; and a new contract, of course, involves the idea of a compensation.

We lay no stress upon this action of the Legislature as an authority upon the point of law involved in this case. On the contrary, we conceive that the Legislature committed an error in naming the parties to whom compensation was due. But we regard the act as a legislative acknowledgment that compensation was due to somebody; and this acknowledgment is not to be regarded as a judicial interpretation, but as the confession of one of the parties in interest. The dedication to the public, which is represented by the sovereign, makes the sovereign a party to the contract. In the interpretation of contracts, whenever there is a doubt as to the meaning of the language, the Code itself declares that "the construction put upon it, by the manner in which it has been executed by both, or by one, with the express or implied assent of the other, furnishes a rule of interpretation." Code, 1951.

One of your Honors intimates that the act of the Legislature and the agreement, executed under it, was a donation, instead of a compromise which it purported to be. We have already had occasion to refer to the maxim, that gifts are not to be presumed—and when we recollect, that at the date in question, the City seemed to be on the very verge of bankruptcy, and executions were constantly issued against its property—is it not too violent a presumption that the authorities meant to give away several hundred thousand dollars, without any consideration whatever? But we presume that even his honor does not mean that the State and City intended to make so liberal a present. The idea must be that they acted under a false view of the rights of the proprietors. If so, it is not a donation, but the contract was made in error.

Whatever may be the view of the Court on this point, we have the plain fact before us, that to the contract of 1820, there were but three parties—the front proprietors, the City and the State—and that all of these parties have concurred, in the most solemn and deliberate form, in treating the conditions of the contract as valid, and in bargaining, giving and receiving upon that hypothesis. Hence, in the interpretation of the contract, we must regard this common action as entitled to some weight.

The position for which we contend, gives effect to every part of the act, and leads to no conclusion that seems unequal or unjust. If the position of the

Court be correct, and the conditions imposed had no binding effect whatever, then all parties were mistaken, and the only conclusion, consistent with justice and fair dealing, would be that the whole agreement would be void for error.

If, on the other hand, the City is invested with the title, the public with the use, and the front proprietors with the servitude, there is no error and no injustice; the stipulations all harmonize, and form mutual considerations, the one for the other, and the contract is in full force in the manner in which the parties understood it, when it was signed and accepted.

It would seem from the opinion pronounced by the Chief Justice, that he does not concur in this part of the opinion of *Mr. Justice Rost*. The Chief Justice says, "as the increase of the alluvion was a matter of physical certainty in the course of time, and equally so the necessity for its being applied to the purposes of private ownership, the owners stipulated for their re-entry into their rights of property of the space they appropriated for the public use, in the event of the violation of the conditions before recited."

We cannot presume that his Honor means that there is an *express* stipulation of re-entry in the act. He is too familiar with its terms, not to know that no such words exist in the contract; he, therefore, only intends to state what he understands to be the legal effect of a violation of the conditions imposed.

If such be the effect of their violation, it is obvious that the conditions are not void. On the contrary, a degree of validity and binding force is attributed to them far beyond that for which we contend. It would seem, therefore, that we hold a position between extreme opinions of two members of the Court, one of whom holds the conditions absolutely null, and the other considers them as so binding, that their violation would confer again upon the proprietors the ownership of which they divested themselves in 1820.

We cannot, however, imagine that such is the deliberate opinion of his Honor. To give to the conditions such an effect, is to invest the act of 1820 with that incident most characteristic of and peculiar to donations. But as both your Honors declared in *Delabigarre's* case, that the act was not a donation, we cannot suppose that any change in your opinion has occurred on that point.

We, therefore, respectfully submit, that the Court has erred in refusing to give to this act the interpretation for which we contend, and that its legal effect is precisely that which its stipulations, though not its name, express. In form it is a donation, in substance a compromise. It purports to give the title of the batture to the City, the use to the public, and it burthens it with the condition of not building. There is nothing illegal in its stipulations. It expresses the intention of the parties and ought to be executed according to that intention.

IV. The propriety of deciding the question of servitude *vel non*, on the demurrer.

We have reserved this for the last, because we desired to present more fully than before our views in support of the existence of a servitude; but we still respectfully contend that the Court has erred in undertaking to decide the question on the demurrer.

The Chief Justice quotes the Code of Practice to the effect that, a party whose action is founded upon a notarial act, must annex a copy, in order "that it may be communicated to the defendant, if he require it;" he then admits, that if the plaintiff fail to do so, the proper course of the defendant is by exception to compel the plaintiff to comply with the provision of the Code; but says, although this was not done, the first error was committed by the plaintiff, and the Court is, therefore, at liberty to look into the act as if it had been annexed and made a part of the petition. We submit that this provision of the Code of Practice has no application to the case. An action founded upon a notarial, or public act, means an action for the enforcement of a contract, not for the assertion of a right of property. In a petitory suit, the plaintiff is bound to disclose his title, but was it ever heard that he was required to file the whole chain of title in court with his petition? Although on the trial of the cause these titles must be adduced in support of his demand, yet it cannot be said that his action is founded upon them; and, in such actions, we hazard little in saying, that the common understanding and practice of the Bar has been, that it was not necessary to file the titles.

The value of a servitude is the object of the plaintiffs' demand; they have stated how and whence it is derived, and they seek to obtain a compensation for

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it, by adopting a contract to which they were not parties. If we were bound to file copies of these acts, then the defendants have waived the right to insist upon their production, by joining issue on the face of the petition. That is the only issue before the Court. The act of compromise is not in the record. It was referred to in the argument, but this does not add it to the record; and not being there, your Honors cannot judicially know its contents. If, therefore, to give effect to the demurrer, the compromise must be tacked on to the petition, the Court has no power to bring it into the record, and the demurrer must be overruled. Still less does its absence from the record afford any just ground for reflections upon the regularity of the proceedings of the plaintiff, or justify any presumptions against their cause. If there is error, or irregularity, it is a common error, and this Court can only entertain the issue as the pleadings present it.

We also submit, that, in order to support the demurrer, the Court has gone out of the record in other matters, which we have already incidentally noticed. The personal knowledge of the Judges has been, in several instances, either opposed, or added to the allegations of the petition. From the fact that this has been done, we must infer that these considerations had some effect upon the conclusion to which the Court arrived. But we submit that they ought not to have been regarded, and that the demurrer should be considered purely and simply upon the charges made in the petition.

If any rights, no matter of what character, were reserved by the original proprietors—whether of servitude or of reversion as donors—those rights were susceptible of alienation. The plaintiffs allege that those rights have been transferred to them, and yet the Court undertakes to say, without looking into their titles, that they have not been transferred.

The rule of decision on demurrers is thus laid down in *Daniels Chan. Prac.* p. 599: "A demurrer will lie whenever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so." This is unquestionably the principle that should govern the action of your Honors on this demurrer. No presumptions are admitted in favor of the demurrer, because it is a harsh remedy, and justice is generally better subserved by hearing the evidence. And yet, in this, it seems that every presumption is taken in favor of the demurrer and against the petition. It is, therefore, our duty to submit the grave questions involved, once more to the attention of the Court, and, even should it prove to be without result, this duty is now performed.

EUSIS, C. J. We have examined and considered the argument of the counsel in favor of a rehearing of this cause. Although more elaborated than that of the learned counsel on which judgment was rendered, we find nothing in it, in point of fact, which has not been already passed in review by the Court.

From the notoriety attendant on all suits relating to the batture, we have given to this cause more of our time than the question it involved required. Separate opinions were delivered by two of the Judges concurring in their result, and nothing has resulted from our inquiries which does not fortify our convictions of the correctness of our impressions which the case, on its first aspect, produced on our minds, viz: that the act of compromise of 1820 created no servitude in favor of the plaintiffs' estates.

We made no reference, in our opinions, to the cases cited by the counsel, which were decided by Courts of Common Law and Chancery, because the question presented was one to be determined exclusively by our own Code and jurisprudence, and we have always made it a rule to preserve the titles to real property, and its modes and uses, in the simplicity in which the Code has created them, and not to introduce the complexities and refinements of an artificial and foreign jurisprudence.

But we do not think that under any system of jurisprudence which recognizes law as a science, the establishment of the servitude could be deduced from the titles of the plaintiffs.

We have been more and more impressed with the difficulty of reconciling the servitude claimed by the plaintiffs, with public policy.

The counsel has referred to the treatise of Mr. Sugden, on *Vendors*, 2 vol. 329, to establish the proposition that, in point of law, there is no objection to the owner of an area, surrounded by houses, contracting that it shall never be built upon. Such establishments are not uncommon in the cities and towns of the United States.

But is there no difference between the reservation of a space for the convenience of the occupants of dwelling houses in a city, which is to be of a permanent character, and is, in fact, necessary for the purposes to which the property is to be applied, and the right set up by the plaintiffs? The bank of the river, years ago, within the recollections of many, was squares distant from the present bank. The alluvion has been regularly making its formations *ab urbe condita*. A servitude of view, or of front, when Tchoupitorilas street was the street next the river, would condemn the intermediate property to remain unoccupied. The owners could appropriate it to none of the purposes for which its situation renders it useful. How are they to meet the burthens of taxation and the expenses and charges to which land in New Orleans is subjected, if they cannot derive profit from its use by improving it?

The whole front of the First District would, at the will of a few of the proprietors of lots, be virtually taken from the domain of property. As those changes in the river bank were inevitable, and to happen in the regular course of time, they were foreseen, and, in the absence of any convention establishing a servitude, Courts cannot be too cautious in impairing the use to which property, by its nature and position, is destined.

The leading case, referred to by the author on the doctrine laid down, has already been noticed by this Court. The case is that of *Keppel v. Bailey*, reported in 12 Chancery Reports, p. 120. The opinion of Lord Brougham, the Chancellor, was quoted by Mr. Justice Rost in the celebrated case of *Franklin's Succession*, 7th Annual Reports. Its application to the pretensions of the plaintiffs to stamp upon this extent of land, required by its position for the wants of trade and commerce, their useless and shadowy servitude is most apposite. "There can be no harm," says his lordship, "in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no mischief and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion, and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."

The rehearing is, therefore, refused.

HENRY PARISH, et al, v. MUNICIPALITY No. 2, et al.

APPEAL from the Second District Court of New Orleans, *Lea, J.*
 EUSTIS, C. J. For the reasons given in the case of *Parish et al, v. The Municipality No. 2*, No. 2749 of the docket of this Court, it is considered by the Court, that the decree of the District Court, bearing date the 7th June, 1852, commanding the Notary, *H. B. Cenas, Esq.*, to deposit one-third of the proceeds of the batture lots, from which an appeal is taken, be reversed, and that the rule taken by the Municipality, in relation to said proceeds, be discharged, with costs in both Courts.

U. C. LATHROP, adm., v. J. L. DELEE.

Action on a promissory note. The protest stated, that the notary "demanded payment of said note of the proper officer at the U. B. Bank, Clinton, where it was made payable." In the note, the words used were, "payable at the Branch of the Union Bank of Louisiana at Clinton"—and a copy of the note accompanied the protest. *By the Court:* This is a sufficient designation of the place where payment was demanded, and the certificate made is sufficient, without further designation, of the particular officer to whom the presentment was made.

Where the notice was deposited in the Post Office, at Clinton, without being addressed to any particular place, and it was shown that the endorser lived upwards of three miles from Clinton, and that the endorser resorted to the Clinton Post Office for his letters, and it did not appear that there was a nearer Post-office, the holder was not bound to send a messenger to him with the notice.

APPEAL from the District Court, Seventh District, Parish of East Feliciana,
Stirling, J. Winter & McRae, for plaintiff. *Merrick, and Bowman & DeLee*, for defendant and appellant.

SLIDELL, J. This case was formerly before this Court, and was remanded for further evidence, 5 Annual, p. 238.

The protest states that the notary demanded payment of said note of the proper officer at the U. B. Bank, at Clinton, where it was made payable. In the note the words used are, "payable at the Branch of the Union Bank of Louisiana, at Clinton," and a copy of the note accompanies the protest.

We consider this a sufficient designation of the place where payment was demanded, and are also of opinion that the certificate of presentment is sufficient, without further designation of the particular officer to whom the presentment was made.

We are not permitted to disregard the certificate of notice, because the Notary is shown to have been occasionally a careless man in his business matters. If it be conceded that, in the present case, his character might have some effect upon the mind in estimating the weight to be given to his certificate, still the District Judge was satisfied of its truth, and there is no sufficient reason why we should disturb his opinion.

The notice being deposited in the Post office at Clinton, without being addressed to any particular place, it would, under the Post-office usage, remain

there. As the endorser lived three miles and upwards from Clinton, the holder was not bound to send a messenger to him. See *Canal Bank v. Barrow*, 2 Annual; *Bank of Columbia v. Lawrence*, 1 Peters, 583. The evidence satisfied the District Judge that, at the time, the endorser resorted to the Clinton office. The conclusion does not seem to us erroneous. Moreover, it does not appear that there was a nearer post-office.

Judgment affirmed, with costs.

LATHROP
F.
DELEE.

THE STATE OF LOUISIANA, STATE OF MARYLAND intervening, v. THE
EXECUTORS OF JOHN McDONOGH and THE CITY OF NEW ORLEANS.

The will of *John McDonogh* conveys the title, or ownership of the property embraced by the legacies, to the residuary legatees, the cities of New Orleans and Baltimore. (EUSTIS, C. J.)

Municipal Corporations are expressly authorised to receive legacies by the Louisiana Code: their capacity, in this respect, is recognized by Article 423, and by the whole course of legislation on the subject. (EUSTIS, C. J.)

By the will the City of New Orleans is a residuary legatee under an universal title. (EUSTIS, C. J.)

The legacy to the City belongs to a class known to the Civil Law, from the foundation of Christianity, by the name of legacies to pious uses. They are an element in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization. (EUSTIS, C. J.)

Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies. (EUSTIS, C. J.) The term pious uses includes, not only the encouragement and support of pious and charitable institutions, but those in aid of education, and the advancement of science and the arts. (EUSTIS, C. J.) They are viewed with double favor by the law, on account of their motives for sacred usages, and their advantage to the public weal. (EUSTIS, C. J.)

Article 1506 of the Code, which provides for the manner in which acceptances of donations for the benefit of a hospital for the poor of a community, or other establishment of public utility, shall be made, pre-supposes the legality of the donation, and there is no ground for any distinction between the right of holding by donation *inter vivos* and *mortis causa*. Nor does the law make any distinction between a legacy to the poor of a city and a legacy to a city for the poor: in both cases it is a legacy to pious uses, and the City is the recipient. (EUSTIS, C. J.)

Under the Civil Law it is no objection to the validity of a legacy to pious uses that it is for the benefit of the poor, even without any designation of locality, and it has been held that a will was good in which a testator instituted *the poor* his heirs. (EUSTIS, C. J.)

The Article 1506 of the Code is not in the ordinary form of a prohibitive law. It is the first of the chapter which treats of dispositions *reprobated* by law in donations *inter vivos* and *mortis causa*. The expression *reprobated*—*reprovetes*—by the law, implies something even more than prohibition. The terms are plain, general and comprehensive, excluding all exception—and are direct positive, and unambiguous. The whole tenor, imperatively establishing the law, has for its object the exclusion of the legal existence of impossible conditions in testaments. (EUSTIS, C. J.)

The Article 1506 of the Code, which provides that impossible conditions, and those contrary to the laws, are reputed not written, is based upon considerations of public policy, and must be carried into effect, however it may conflict with the intention of the testator. (EUSTIS, C. J.)

The Article 1706, which provides that the intention of the testator must principally be endeavored to be ascertained, is a rule of interpretation only and subordinate to the Article 1506. (EUSTIS, C. J.)

The right of a man to dispose of his property after his death is derived, exclusively, from the law; and if the law says that, in certain cases, from motives of policy, the vain conceits of testators—*inplex voluntatis*—shall be held not written; it cannot be disregarded. (EUSTIS, C. J.)

The rules of interpretation found in the Code, belong to the doctrinal part of the law, and are not restrictive of the rules for the interpretation of contracts and testaments found in the body of the Civil Law; all are advice given to the Judge—landmarks they may be called—to be applied not so

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much *ratione imperii*, as *imperio rationis*, and that while it is his duty not to lose sight of any of them, he must, in every case, exercise his discretion in applying them, ever bearing in mind that the least circumstance, at times, is sufficient to prevent their application. (Rost, J.)

It is true that, in the construction of wills, Courts of Justice ought not to depart, without necessity, from the proper sense of the words used. That necessity seldom occurs in cases of single dispositions unconnected with others the will may contain. But when the several dispositions of the will are constituent parts of one scheme, each must receive the sense which results from the entire instrument; and the rule has, in that case, reference, not to the terms used in any one disposition, but to the entire contents of the will. In such a case, if there is just reason to believe that the testator has used terms in a sense different from that sanctioned by usage, they must be taken in the sense in which it is believed he understood them. (Rost, J.)

The intention of the testator must prevail over the grammatical meaning of the words which he has used, provided his intention is ascertained by dispositions contained, and words used in the will, and it is manifest that he had another object and another thought than that which the terms used in a particular disposition would otherwise convey. (Rost, J.)

When the sense of a particular disposition, resulting from the entire instrument, has been ascertained, Courts may go further in cases of testaments than in cases of contracts, in disregarding the grammatical meaning of the words used, so far indeed as to supply words omitted, which may be done, whenever the obvious meaning and the other parts of the will restore these words naturally.—(Rost, J.)

The intention of the testator to exclude his heirs at law, at all events, being admitted, the conclusion is inevitable, that if the Cities could not take the legacies, or violate the conditions which the testator had the right to impose, he intended to vest his property in the States of Louisiana and Maryland. (Rost, J.)

The intention of the testator is clear—that if the bequest to the Cities did not take effect, or became forfeited by the violation on their part of the conditions, the States were to take it without conditions, as the next best thing he could do to insure the preservation of his fortune, and the application of it, in his name, to charitable uses. (Rost, J.)

The intention of the testator, and the sense in which he used the word *lapae* being manifest, under the rule already cited, and the additional one "*in conditionibus testamentorum voluntatem potius quam verba considerare oportet*," that sense should be preferred though not the most correct and usual. (Rost, J.)

That *McDonogh* did not intend, in the event the Cities could not take the legacies, that the States should, coupled with the conditions—is apparent from his requesting the Legislatures of the States to carry his intentions into effect as far and in the manner which should appear to them most proper. (Rost, J.)

Under the will the disposition in favor of the City of New Orleans is a bequest to pious uses.—(Rost, J.)

Under the Code the City of New Orleans can accept donations made to the poor, and take by will and by donation *inter vivos*. (Rost, J.)

Under the successive Constitutions of Louisiana, the city of New Orleans and its officers have been made permanent functionaries of government for all purposes of police and good order, and for the punishment of minor crimes and offences. The police and good order of a city include the education of youth, and the care of the poor within its limits. (Rost, J.)

Cities can hold property patrimonially, and the property thus held may be applied by law to any object for which the city is bound to provide: and there is nothing contrary to public policy, or injurious to creditors, in the enforcement of a condition appended to a bequest, and without which the bequest would not have been made, that the property given shall be applied to some of those objects and shall never be alienated. The giving, on such a condition, is a reasonable liberty to bestow, and the bequest, by providing a fund which the city was otherwise bound to supply, enriches it and increases its means to meet its obligations. (Rost, J.)

If the legacy had been made directly to the poor, or the children of the poor, it would have come within the letter of the law; the City would have taken charge of it, and administered it for the beneficiaries. But this is not the only form such a disposition can assume, and the bequest, as made, comes within the spirit and learning of our jurisprudence in the matter of charitable bequests. (Rost, J.)

Donations to a city for pious uses, and for the erection of works of public utility, stand upon the same footing—and in either case the destination affixed to the property by the testator, follows it in the possession of the legatee, who is, notwithstanding, vested with the title. (Rost, J.)

Uncertainty seems to be the essence of charitable bequests. Whenever the beneficiary is designated by name, he has a legal right which he can exercise, and his merit is alone to be considered—and the bequest ceases to have the peculiar merit of a charity. Under our law bequests for the poor, or for their benefit, are not void for uncertainty. (Rost, J.)

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If the disposition in the will was in favor of what is called in the will, the General Estate, it is invalid. If it establishes a legal and an equitable title in the technical sense of the English law, it is equally invalid. But if it vests in the City a title in full ownership, with a destination to charitable uses, for which the City would otherwise be bound to provide—it is lawful, and may be carried into effect. One of these positions must be taken. It is then impossible to evade or disregard the textual provisions of Article 1706 of the Code, which provides that a testamentary disposition must be understood in the sense in which it can have effect, rather than in that in which it can have none. (Rost, J.)

When, under all the different interpretations of which a will is susceptible, it is lawful and may be executed, the construction should rest upon the words and arguments used by the testator. But where one interpretation will give effect to the will, and the other would not, the decision of the law supercedes the discretion of the Judge, and commands him to assume that the testator intended what was lawful. (Rost, J.)

The condition in the will, not to alienate, is not unlawful in this particular case. A city may, in a case like this, be deprived of the *ius abutendi* over its property for an object of public utility, without its right of property being affected thereby; the Legislature having always the right to remedy the effects of the disposition, whenever the alienation of the property given becomes of public advantage. (Rost, J.)

The distinction between this and *Henderson's* will (5th Annual) is obvious. *Henderson* made no disposition of his property in favor of any one, but simply provided that it should forever form part of his succession and be administered by his executors and commissioners to be named after them to the end of time—while *McDonogh* has made a valid disposition of his property, and the perpetuity of the bequest is merely the consequence of the perpetual existence of the legatees. (Rost, J.)

Under the will of *McDonogh*, the cities of New Orleans and Baltimore are not invested with any title known to the laws of Louisiana. Under our system there can be no ownership stripped forever of the right of possession, use, administration and disposal. Such an estate has no warrant in our Code, nor precedent in our jurisprudence. (SLIDELL, J. dissenting.)

The law, from wise motives, permits men to exercise a last act of volition over their estate by disposing of its ownership. But when they exercise this just privilege, they must exercise it under the law. They have no right to invent new tenures of property. (SLIDELL, J. dissenting.)

The ownership is not given to the Cities. The language is not, I give and bequeath to the Cities—but I give and bequeath to the Cities to and for the several intents and purposes hereinafter mentioned. Those intents and purposes are fully expressed in subsequent clauses of the will. Being thus referred to, they must be considered as embodied in the devising clause, and clearly qualify and limit it. (SLIDELL, J. dissenting.)

The intention of the testator to withhold from the Cities the *ownership* of his estate, in any sense of that term known to our law, admits of no doubt. It is interwoven with the whole theory of the will, and speaks unmistakably through its entire contents. (SLIDELL, J. dissenting.)

The real legatee intended and preferred by *McDonogh* was the Ideal Being which he designated as his General Estate. The Cities were intended to be the mere supervisors of the Perpetual Trust which he desired to create, and which, in its turn, was to be the source of the other trusts contemplated by the will. (SLIDELL, J. dissenting.)

The Ideal Being, contemplated by the will, has no legal existence, and is incapable of taking. And the States of Louisiana and Maryland, by ratifying the institution of the present suit, have clearly disapproved of the scheme of future incorporations contemplated by the will. (SLIDELL, J. dissenting.)

It is apparent from the will that *McDonogh's* preference, in the disposition of his property, was for the extraordinary scheme which he had so elaborately prepared. He desired it to be carried out in its *entirety*, and forbade the Cities to violate *any* of its provisions. But still an apprehension existed in his mind that the scheme might fail, and from "whatsoever cause" this failure might arise, by "whatsoever means" it might come to pass, his desire was that the States of Louisiana and Maryland should then be the recipients of his fortune, who, by virtue of their sovereign power, could accomplish the substantial execution of such of his wishes as they might consider lawful, and to whose discretion and fidelity he was willing to leave their execution. The great object of the testator was the education of the poor. That paramount object, with other wishes of the testator, so far as they may be deemed practicable and politic, the States can, and no doubt would, in good faith and with a just discretion, endeavor to accomplish; and thus the charitable desire of the testator would be disappointed only as to the preferred mode of its fulfillment, an alternative of his own choice being adopted. (SLIDELL, J. dissenting.)

It is conceded that *McDonogh* intended to exclude his heirs at law from the inheritance of his property. But it is said that *McDonogh* did not dispose of the title and ownership of the estate. But this view is narrow and technical, and asks from an unprofessional mind the nice accuracy of an expert conveyancer. This is contrary to the received theory of the interpretation of wills. The law is indulgent to testators, who are regarded as *inopes consilii*. It exempts the phraseology

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of wills from technical restraint, and obeys the clear intention of the testator, however informal the language in which it may be announced. If that intention be even obscured by conflicting expressions, it seeks the intention, rather in a rational and consistent, than in an irrational and inconsistent purpose. Of two modes of construction it prefers that which will prevent a total intestacy. (SIDELL, J. dissenting.)

By the lapse of the legacies to the Cities, the testator meant their failure to take effect from any cause whatever. By the expression "said legacies wholly, or partially so lapsed shall enture, &c.;" he evidently meant the property embraced in those legacies. To say that under the clause in question he simply intended to place the States in the stead of the Cities—their action fettered by the same restrictions—their title qualified and limited by the same anomalous provisions as to possession, use and management is to obliterate from the clause its closing words, which commit to the States respectively a dominion controlled only by their own discretion. (SIDELL, J. dissenting.)

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J.* WILL OF JOHN McDONOGH.

IN THE NAME OF GOD, AMEN. I, John McDonogh, a native of the City of Baltimore, in the State of Maryland, United States of America, now an inhabitant of the Town of MacDonogh in the State of Louisiana, aware of the uncertainty of this mortal life, yet of sound mind and memory, for which, and all other blessings, thanks to Almighty God, do make this, my Olographic Will, as my last Will and Testament, for the disposal of all my worldly property and effects, of every kind, of which I may die possessed, in manner and form following; That is to say, (First, declaring that I have never been married, and that I have no heirs living, either in the ascending or descending lines) I will, that immediately after my death, an inventory shall be made of all my property, and effects, by a Notary Public, assisted by two or more persons, whom my Executors (herein after named) shall appoint, the same to be done on oath. I give, will, and bequeath to the Children of my Sister Jane, the Widow of a Mr. Hamet of Baltimore, in the State of Maryland, in equal proportions, all that Lot, or parcel of ground, (with the improvements thereon) laying in Baltimore County and State of Maryland, Containing ten acres, more or less, which lot of ground I acquired by purchase, on the twenty seventh day of February in the year of our Lord Eighteen hundred and nineteen, of John Pogue, of the said City of Baltimore, as per deed of conveyance to me enregistered on the same day, by William Gibson, Clerk of the Baltimore County Court, among its Land Records;—The usufruct, however of the afore mentioned landed property and improvements, I give and bequeath to my said sister Jane, during her life time.—I give, will, and bequeath, to my said Sister Jane, Widow Hamet, the sum of *Six thousand dollars*, recommending to her, my said Sister, to place said Six thousand dollars, on interest either in Bank Stocks, or otherways, and by economy, to make the interest thereof, support her in her old age.—I will and bequeath, their freedom, (as a reward for their long and faithful services,) to my old servants, Gabriel, James Thornton, Tanness or Dennis, Noel, Mark, Old John, John Defage, Old Harry, Richard, and Longmary, requesting my Executors (herein after named) to take the necessary steps, in conformity to law, to see this, my will and desire executed.

It is my will and I direct my executors, (hereinafter named,) immediately after my death, to correspond with the American Colonization Society, at the City of Washington, in the District of Columbia, for the purpose of ascertaining, when said Society, intends sending a vessel to Liberia, on the Coast of Africa, with emigrants, from New Orleans, and by the first vessel, so sailing from New Orleans, for Liberia, to send all the rest and residue of my black people, old and young, (with the exception of the ten aforementioned individuals, to whom I have directed their Freedom to be given, here, in New Orleans,) men, women and children, (and also, with the exception of the black man Philip, his wife Fanny and their children, the black woman Jane or Jenny, and her children, the mulattoe man George, a carpenter by trade, the mulattoe boys William and Henry, carpenters by trade, the black men Houma, David Crocket and George Calhoun, the mulattoe or Griff boy Jerry, the black women Sophie and Dolly, Hagar, and Anna, or Hannah, and their children, all of whom I have lately purchased, as it is my will, that they, the said Phillip and Fanny his wife, and their children, Jane and her children, the mulattoe man George, a carpenter

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by trade, the mulattoe boys William and Henry, Carpenters by trade, the black men Houma, David Crocket, and George Calhoun, the mulattoe, or griff, boy Jerry, and the black women Sophie, Dolly, Hagar, and Anna, or Hannah, and their Children, with any other black, or colored people, whom I may acquire by purchase subsequent to the date of this, my last Will, and Testament, shall serve those, (by being hired out for wages, or kept employed on my plantations, if thereon so employed at my death,) to whom I have herein after willed the rest, residue and remainder of my Estate, real, and personal, fifteen years from and after my death; when then, after said service of fifteen years, my Executors (hereinafter named) will deliver said black and colored people, up to the American Colonization Society for Colonizing Free people of Color, of the United States, established at the City of Washington, in the District of Columbia, to be also sent to Liberia, on the Coast of Africa.) And to pay a proportionate part of the Charter of said Vessel for transporting them to Africa, furnishing them with provisions, stores, medicines, &c., &c. for the Voyage.—I also direct my Executors (hereinafter named) to lay out and expend for the use of those, my people, who are to go immediately after my death, to Liberia, the sum of *One thousand dollars* in such Articles as ploughs, hoes, spades, axes, nails, common locks, hinges, clothing, garden and other seeds, &c., &c., and divide out those articles among them in equal proportions, and see them put on board the vessel at the time of sailing.—My Executors will also be pleased to give letters of recommendation, to those my people, directed to the inhabitants of that Colony, setting forth their good characters, and the morality of their lives, as a passport to their good opinions, and to purchase and place in the hands of each of said individuals, old and young, at the moment of sailing for Africa, the volume of the Holy Gospels of the Old and New Testament, as the most precious of all the gifts we have it in our power to give or they to receive.—And for the more general diffusion of Knowledge, and consequent well being of Mankind, convinced as I am that I can make no disposition of those Worldly goods which the most High has been pleased so bountifully to place under my Stewardship, that will be so pleasing to him, as that by means of which the poor will be instructed in Wisdom and led into the path of virtue and Holiness,)—I Give, Will and Bequeath, all the rest, residue and remainder of my estate, real and personal, present and future, as well that which is now mine as that which may be acquired by me hereafter, at any time previous to my death, and of which I may die possessed, of whatsoever nature it may be, and wheresoever situate, (subject to the payment of the several annuities or sums of money hereinafter directed and set forth; which said annuities or sums of money, are to be paid by the devisees of this my General Estate, out of the rents of said estate,) Unto the Mayor, Aldermen and inhabitants of New Orleans, (my adopted city) in the State of Louisiana, and the Mayor, Aldermen and inhabitants of Baltimore (my native City) in the State of Maryland, and their Successors, (in equal proportions of one-half to each, of said Cities of New Orleans and Baltimore,) forever. To, and for, the several intents and purposes, hereinafter mentioned, declared and set forth, concerning the same, and especially for the establishment and support of Free Schools in said Cities, and their respective Suburbs, (including the Town of Macdonogh as a Suburb of New Orleans;) wherein the poor, (and the poor only) of both sexes of all Classes and Castes of Color, shall have admittance, free of expense for the purpose of being instructed in the Knowledge of the Lord and in reading, writing, arithmetic, history, geography, &c., &c., under such regulations as the Commissioners (to be appointed as hereinafter directed,) of said Schools shall establish, always understood and provided however, that the Holy Bible of the Old and New Testament, shall be at all times and forever made use of in those Schools, as one, (and the principal one) of the reading or class books, which shall be used by the pupils therein as the first object of every School, and of all teaching of the youth of our Country should be to implant in their minds a Knowledge of their duty to God, and their relation of Men, to their divine Creator; And that Singing classes shall be established and forever supported, and singing taught, as a regular branch of education in said Schools, by which means, every pupil will acquire the rudiments of the Art, and obtain a Knowledge in singing Sacred Music.—As relates to my real estate, that no part thereof shall ever be sold or alienated by the said Mayors, Aldermen and inhabitants of the respective Cities of New Orleans and Baltimore, or their Successors, but the same, shall forever, thereafter be let, from time, to time, to good tenants, the lots

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of ground improved with houses, laying in the City of New Orleans, its suburbs, Town of Macdonogh, or elsewhere, let by the Month or the year, and the unimproved lots of ground, in the City of New Orleans, its suburbs, Town of Macdonogh or elsewhere, leased for a term not to exceed twenty-five years at any one time (the rent payable monthly or quarterly) and to revert back at the end of said time, with all the improvements thereon, (free of cost, to the lessors,) to be rented thereafter by the month or year. And the lands wherever situate in the different parishes of the State, leased in small tracts, for a term not to exceed one to ten years, revertable back with their improvements, to be re-leased for a shorter time and at higher rates.—My intentions being, (I in consequence instructing my Executors (hereinafter named) to invest my personal effects, (say, money, bonds, notes or stocks on hand, interest accruing thereon, furniture of house in which I reside, and effects about it, as well as the amount of all debts owing to me as fast as they are received,) in real estate, say lots of ground and houses, and lots of ground laying in the City or suburbs of New Orleans, and hand over said real estate, as soon as purchased, with the title deeds thereto, to the Commissioners and Agents of my General Estate, (said Commissioners and Agents of my General Estate to be named by the respective Corporations of said Cities of New Orleans and Baltimore in the manner hereinafter directed.) So that by said means the whole of my estate, real and personal, (excepting only my black people, the legacy bequeathed the Children of my Sister Jane, and that to herself,) will become a permanent fund on interest, as it were, (Viz: a fund in real Estate affording rents,) no part of which fund (of the principal) shall ever be touched, divided, sold, or alienated, but shall forever, remain together, as one Estate, (termed in this, my last will and testament as “My General Estate” or “The General Estate”) and be managed as I herein direct. The nett amount of rents which shall be collected annually shall be divided equally, (half and half) between the said two Cities of New Orleans and Baltimore, by the Commissioners and Agents of my General Estate, (to be named in the manner herein after directed) after paying the several annuities, and sums of money, hereinafter provided for, and set forth; and applied forever to the purposes for which it is hereby intended and destined.—FIRSTLY, I give and bequeath to the American Colonization Society for Colonizing the Free people of Color of the United States, established at the City of Washington in the District of Columbia, for the purposes of its noble and philanthropic institution, an Annuity for the term of Forty Years, Counting from and after the day of my decease, of the one eighth part, (or twelve and a half per cent) of the nett yearly revenue of rents of the whole of the Estate as herein before willed and bequeathed unto the Mayors, Aldermen and inhabitants of the Cities of New Orleans and Baltimore, but which one eighth part of the nett yearly revenue of rents of said Estate, as aforesaid, shall not entitle the said American Colonization Society for colonizing the Free people of Color of the United States, to receive or demand in any one year a larger sum than *Twenty five thousand dollars*, should the one eighth part thereof amount to a larger sum.—Trusting in full confidence that the inhabitants of this free and happy land throughout all its borders, from Maine to Louisiana, will sustain this institution, (one of the greatest glories of our country,) and enable it to accomplish its humane and holy object in its full extent.—And notwithstanding that I look upon and consider the instruction of the poor in the Knowledge of God and the wisdom of Man, as the first, best, and Holiest of all charities (as they are thereby taught their duty to their Creator, and those everlasting principles of virtue which instill self respect and teach men the dignity of their nature, which restrain them from falling into vice, and becoming in consequence inmates of the Penitentiary, or Alms house,) and do not consider the endowment of Asylums and Hospitals as the best mode of permanently serving and doing good to my fellow man, still as it is probable, whilst the present race of men exist, constituted as we are, that some portion thereof, from the various causes to which frail humanity is liable, will fall into error, and of consequence, become helpless and destitute.—SECONDLY, I give and bequeath to the Mayor, Aldermen and inhabitants, of the City of New Orleans, in the State of Louisiana, and their successors, forever, for the express and sole purpose of establishing an *Asylum* for the *poor*, of both Sexes and of all ages, and castes of Color, where they may be sheltered, clothed, fed and taken care of, made useful according to their respective degrees of health, strength and capacity, and mendicity, thereby ban-

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ished from the Streets of the city, and its suburbs, (including the Town of Mac-Donogh) an annuity of the one eighth part, (or twelve and a half per cent,) of the nett yearly revenue of the rents of the whole of the General Estate as hereinbefore willed and bequeathed unto the Mayors, Aldermen and inhabitants of the Cities of New Orleans, in the State of Louisiana, and of Baltimore in the State of Maryland, and their successors for ever; the said annuity to be paid yearly, until such time, as the said one eighth part of the said nett yearly revenue of rents shall amount, to the full and entire sum of *Six hundred thousand* dollars, when it shall cease, and be no longer paid.—And for the purpose of carrying this, my desire and intent into effect I request, authorize, and empower the City Councils of the City of New Orleans, on the First Monday of January of every year, to name and appoint one respectable Citizen out of each ward of the City and Suburbs of New Orleans, (including the Town of Macdonogh) but who shall not exceed seven in number, nor be members of the said City Councils at the time, who shall be commissioners therein, which Commissioners so named, shall serve for the term of twelve Months, and until a new election, on the first Monday of January of the following year shall be made by the said City Councils, of Commissioners, to replace those of the preceding year, (none of whom shall be elected for the second year,) and so on from year to year, to the end of time; and said Commissioners shall have the management of said Institution, its funds, and everything in relation to it; (the Mayor and City Councils of the City of New Orleans, having however, the general supervision, and to whom the Commissioners are liable for the faithful performance of their duty herein; and to whom, annually, on going out of office, they must render accounts of their administration, showing particularly its receipts and expenses, state of its funds, its real estate, &c, &c, which accounts will be audited, by the said City Councils, through a Committee, from their body, named for the purpose, and who will publish them yearly, in two of the public newspapers printed in the City of New Orleans.) The said Commissioners (to be named as aforesaid) will receive annually or semi-annually, the amount of the annuity, until such time as they shall have received, according to this bequest the whole amount of it, say, the sum of six hundred thousand dollars; and as they receive it, they shall invest it in Bank Stocks, or other good securities, on landed estate on interest, so as to augment the amount thereof by the accumulation of interest to the largest possible sum, up to the time when the last of the annuity, shall be received by them; at which time, (when the last of the annuity shall be received,) It is my desire, and I direct, the said Commissioners to take such part of said sum, (not to exceed however the one third of the whole amount of principal and interest which may have accrued thereon,) as may be necessary and invest it in the purchase of such landed Estate, and in the erection of such buildings, as will be appropriate to the object intended and wanting; and in the furnishing of said buildings when completed, in beds, bedding, clothing, and all other necessary articles, and the residue of said sum, whatever it may be, (but which shall be at least the two thirds of the whole amount of principal and interest,) I direct to be invested in the purchase of real estate, say, lots of ground and houses, and lots of ground, situate in the City, or suburbs of New Orleans, (such lots of ground as will probably greatly augment in value,) which real estate, (when purchased, shall never thereafter be sold or alienated,) for the purpose of deriving therefrom, a permanent revenue, (in rents) for the support of said institution for ever; as no part of the principle sum, or the interest which may accrue thereon, shall ever be taken for the support of the institution; my intention being, that its support and the payment of all the expenses, necessary to its support, shall be supplied exclusively from the revenue in rents, of its real estate, and the revenue, derivable from the labor of the poor, its inmates.—(Which houses, as also the buildings of the institution, I recommend and direct to be kept constantly insured against the risk of fire, so that, if an accident should occur, there would be means to rebuild them,) I recommend to the Commissioners, to select a situation high and healthy, for the establishment of the institution; say a tract of land of three or four acres in front on the river Mississippi, by forty or eighty acres in depth, situate within three, four or six miles of the City of New Orleans, on either bank, above, or below it; and to erect the buildings of brick, in a style of taste and elegance, of great solidity (as they are intended to stand for ages,) airy and of proportionate elevations.—They the Commissioners, (to be named as aforesaid) are permitted, however, at

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any time (when they have money on hand, or stocks of this fund,) when opportunities offer of making good investments of it, in real Estate, (say, lots of ground and houses, and lots of ground, situated in the City of New Orleans or its suburbs, yielding rents, or likely to yield rents,) to invest such parts thereof as they think proper, (such purchases however to be approved by the Mayor and City Councils of the City of New Orleans,) in such Real Estate. And also, when an opportunity offers of acquiring such a tract of land, as will be wanted for the Institution, (at a cheap rate,) to purchase it.—And as I believe our climate and soil, well adapted to the cultivation of the mulberry tree, and the rearing of the silk worm, such a tract of land as I recommend the purchase of, if planted with mulberry and the cultivation of silk undertaken, (which is a very light employment, well suited to the weak and aged,) would, I have no doubt, yield an annual revenue to the Institution, which would go far towards paying the expenses for its support; I therefore earnestly recommend its trial to the Commissioners.—I also recommend to the Commissioners, to apply to the Legislature of the State for an Act, to incorporate said Institution; (subject always however, be it understood to the conditions herein provided for.)—THIRDLY, I give and bequeath to the “Society for the relief of destitute Orphan boys” of the City of New Orleans in the State of Louisiana, (of which institution Beverly Chew was president on the 28th day of April last, 1838,) for the express and sole purpose (and of no other) of being invested in the purchase of Real Estate, (say, lots of ground and houses, and lots of ground,) situate in the City of New Orleans and its Suburbs, from which a perpetual revenue from the rents of said Real Estate, may be drawn for the support of said Institution, an Annuity of one eighth part (or twelve and a half per cent) off the nett yearly revenue of rents of the whole of the General Estate, as hereinbefore willed and bequeathed, to the Mayors, Aldermen and inhabitants of the Cities of New Orleans, in the State of Louisiana, and of Baltimore, in the State of Maryland, which Annuity of the One Eighth part of the nett yearly revenue of rents as above stated, shall be set apart yearly or half yearly by the Commissioners and Agents of the General Estate, (to be appointed as hereinafter set forth) and deposited in some one or more of the Banks in the City of New Orleans, (which pay an interest on money deposited with them,) until such time as said Annuity shall amount to the sum of FOUR HUNDRED THOUSAND DOLLARS, (exclusive of any interest, which may have accrued on it,) when it shall cease and be no longer paid.—And as the said Fund of Four hundred thousand dollars, accumulates in Bank, The Directors of the said “Society, for the relief of destitute Orphan Boys” assisted by the Mayor and Aldermen, of the City of New Orleans, Who, (the said Mayor, and Aldermen,) shall approve of the purchases, of real Estate, and become parties to the deeds, by which it is acquired, may, from time to time, (as good purchases offer,) Invest it in purchases of Real Estates, (as aforesaid,) Lots and houses, and lots of ground, laying within the City of New Orleans, and its suburbs, yielding rents, or likely to yield rents, and to increase greatly in value; which Real Estate, once acquired, shall never, thereafter, be alienated, or sold, by said Institution, but shall forever be retained, and held, by it, and remain its property;—The Title deeds of purchase, by which said Institution shall acquire said Real Estate, shall set forth, that it is made from Funds of this Bequest, and that said Real Estate cannot be sold, or alienated, by said “Society for the relief of destitute Orphan Boys.—The Funds, (when accumulated,) as wanted, for the payment of the Real Estate, when purchased, (but for no other purpose,) shall be drawn from Bank, by the Commissioners, and agents, of the General Estate, and paid over to the Directors of said “Society for the relief of destitute Orphan Boys, and the Mayor and Aldermen of the City of New-Orleans.—I recommend to the Directors of the “society for the relief of destitute Orphan Boys, to keep such houses, as may be purchased, or built with the funds from this Bequest, regularly insured against all risk by Fire, by which means, in case of accident, they would have the means to reconstruct them.—FOURTHLY, I give and bequeath to the Mayor, Aldermen, and Inhabitants of the City of Baltimore, in the State of Maryland, and their successors, forever, for the express and sole purpose of establishing a *School Farm*, on an extensive scale, for the destitute, and the *Poorest*, of the *poor*, male children, and youth, (say, Firstly, of the City of Baltimore, in the state of Maryland; Secondly, of every Town and Village of said State; and Thirdly, of *all*

the great maritime Cities of the United States; say, New York, New-Orleans, Philadelphia, Boston, Charleston, Savannah, Providence, Salam, &c, &c.) of all castes of color, from the age of Four years, to that of sixteen years, where they shall be sheltered, lodged, clothed, fed, instructed in the christian Religion, and a plain English Education given them, including, reading, writing, arithmetic, History, Geography, &c, &c; and taught practically, (by making them labor) the art of husbandry, or farming, in all its parts, and details, as well as the science, generally, of agriculture; under such regulations as the Directors, (to be appointed as hereinafter set forth,) of said School Farm, shall establish; always understood, and provided however, that the Volume of the Holy Bible, shall be at all times, and forever, made use of in the School, or schools, of this Institution, as One, (and the principal one,) of the reading or class Books, which shall be used by the pupils therein; as the first object of every school, and of all teaching of the youth of our Country, should be to implant in their minds, a Knowledge of their duty to God, and the relation of men to their divine Creator;—and that singing classes shall be established, and for ever supported; and singing taught, as a regular branch of Education, in said schools, by which means, every pupil will acquire the Rudiments of the art, and obtain a knowledge in singing divine Psalmody, or sacred music.—An annuity of the One Eighth part, (or twelve and a half per cent,) of the nett yearly Revenue of rents, of the whole of the General Estate, as hereinbefore willed and bequeathed, unto the Mayors, Aldermen and Inhabitants, of the Cities of New-Orleans, in the State of Louisiana, and Baltimore, in the State of Maryland, and their successors, forever;—the said annuity to be paid yearly, or half yearly, until such time as the said One Eighth part of the said nett yearly Revenue of rents, of said General Estate, shall amount to the full and entire sum of *Three Millions of Dollars*; when it shall cease, and be no longer paid;—But with the declared and well understood condition, (for the purpose of paying off this, the Fourth annuity, in as short as space of time as possible,) that any one, and all Three, of the first aforementioned annuities are filled, and paid off, or the time expires, (as in the annuity to the American Colonization Society, for colonizing the Free people of Color, of the United States,) during which, said annuity is to be paid, that then, from said periods respectively, (say, the periods from which, the said three foregoing annuities, shall respectively be paid off, or expire,) the proportions of the nett yearly revenue of rents, of the General Estate, which were payable respectively under them, the said annuities, shall go to, and be paid, to this, the Fourth, and last annuity, under this, my Last Will and Testament, Bequeathed to the Mayor, Aldermen, and Inhabitants of the City of Baltimore, in the State of Maryland, and their successors, forever; for the purpose of establishing a School Farm, (as also, any surplus, should it so occur,) within the Forty years that I have willed an annuity of the One Eighth part, or twelve and a half per cent, of the nett yearly revenue of rents, of the General Estate, to the “American Colonization Society, for colonizing the Free people of Color, of the United States.” (above the sum of Twenty five thousand dollars, which said society is authorized to receive, in any one year, and no more;) by which means, the said Mayor, Aldermen, and Inhabitants, of the City of Baltimore, In the State of Maryland, and their successors, for the purpose of establishing a School Farm, will, under this, the Fourth annuity, receive, at one period, a proportion of said nett yearly revenue of rents, of the General Estate, of the One Eighth part, or twelve and a half per cent; at another period, of the One Fourth part, or Twenty five per cent, or more; at another period, of the Three Eighth part, or Thirty seven and a half per cent, or more; and at another period, of the One half part, or Fifty per cent, of said nett yearly revenue of rents, of the General Estate, until they shall have received, under said annuity, the full amount of Three Millions of dollars.—(and the Mayor, Aldermen, and Inhabitants, of the City of New-Orleans, in the State of Louisiana, and the Mayor, Aldermen, and Inhabitants, of the City of Baltimore, in the State of Maryland, for the establishment and support of Free Schools, in said Cities, and their respective suburbs, will receive the One half of the nett yearly revenue of rents, of the General Estate, and no more, until such time as the whole of the Four annuities, as set forth herein, shall be paid off;—from which period, (the time when all four of said annuities shall be paid off,) they, the said two Cities, of New-Orleans, in the State of Louisiana, and Baltimore, in the State of Maryland, will receive, and divide, equally between them, as here-

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in set forth, and for the purposes as aforesaid, the whole of the nett yearly revenue of rents, of the General Estate, to the end of time.—And for the purpose of carrying this, my desire, and intent, into effect, I request, authorize, and empower, the Mayor, and City Council of the City of Baltimore, in the State of Maryland, on the First Monday of January of every year, to elect one respectable Citizen, out of each ward of said City, and its suburbs, but who shall not exceed seven in number, nor be members of the said City Council, at the time, who shall be Directors therein; which Directors, so elected, shall serve for the term of Twelve months, and until a new election, on the First Monday of January, of the following year, shall be made by the said Mayor and City Council, of Directors, to replace those of the preceding year, (none of whom shall be eligible, as Directors, for two consecutive years,) and so on, from year to year, forever;—And said Directors, (elected as aforesaid,) shall have the management of said Institution, its funds, and every thing in relation to it; (The Mayor, and City Council, of the City of Baltimore, having, however, the general supervision thereof, and to whom the Directors are liable for the faithful performance of their duty therein; and to whom, annually, on going out of Office, they must render accounts of their administration, shewing particularly, its receipts, and expenditures, state of its Funds, its Real Estate, and every thing in relation to, and concerning said Institution; which accounts must be audited by the said Mayor, and City Council, through a committee from their body, appointed for the purpose, and who will publish them yearly, in two of the public news papers, printed in the said City of Baltimore.—The said Directors, (to be elected, as aforesaid,) will receive annually, or semi-annually, the amount of the annuity, until such time as they shall have received, according to this Bequest, the whole amount of it; say, the sum of Three Millions of Dollars;—and as they receive it, they shall invest it in Bank Stocks, or other good securities, on Landed Estate, on interest; so as to augment the amount thereof, by the accumulation of Interest, to the largest possible sum, up to the time when the last of the annuity shall be received by them;—At which time, (when the last of the annuity shall be received,) It is my desire, and I request and instruct said Directors, to take such part of said sum, (not to exceed however, the One sixth part of the whole amount of principal, and interest, which may have accrued thereon,) as may be necessary, and invest it in the purchase of such a Tract, or Tracts, of land, and in the erection of such Buildings, as will be appropriate, to the object intended, and wanting; and in the furnishing of said Building, (when completed,) and Lands, in all necessary furniture, Beds, bedding, animals, plows, harrows, hoes, spades, and other articles;—and the residue of said sum, (the whole of the residue thereof,) whatever it may be, (but which shall be at least, the Five sixths, or five parts, out of six parts, of the whole amount of principal and interest,) I direct to be invested in the purchase of real Estate; say, lots of ground and houses, and Lots of ground, situate in the City, suburbs, and vicinage of Baltimore, in the State of Maryland; or Tracts of Land in its immediate neighborhood; viz, such lots, or Lands (to be all purchased under Fee simple Titles, as will probably greatly augment in value; (which Real Estate, when purchased, shall never be sold, or alienated, but shall be held, and remain forever, the property of the Institution,) for the purpose of deriving therefrom a permanent, and perpetual revenue;—(a revenue from rents of Real Estate; not from interest, on money loaned, or stocks,) for the support of said Institution, forever.—As no part of the principal sum, or the interest which may accrue thereon, shall ever be taken for the support of the Institution; my intention being, that its support, and the payment of all the expenses, necessary to its support, shall be supplied exclusively from the revenue, in Rents of its Real Estate, and the Revenue derivable from its Farm. The houses to be leased for no longer a time than twelve months, at any one time; the lots of ground, and Lands, for Five, Ten, Fifteen, Twenty, or Twenty five years, but, in no instance, for a longer time than Twenty five years, at any one time; revertible back, at the end of the time for which they may be leased, with all the Improvements on them, (said Improvements to be Free of cost to the Lessor,) to be re-leased for shorter periods, and at higher rates;—By which means, the Rich, or those who are in easy circumstances, will be made to assist, in some measure, in the support and education of the poor.—They, the Directors, (to be elected as aforesaid,) are permitted however, at any time, (when they have money on hand, or stocks of this fund,) when opportunities offer, of

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making good investments of it, in Real Estate, (say, Lots of ground, or houses and lots of ground, situate in the City of Baltimore, its suburbs, or vicinage; or Tracts of land, in its immediate neighborhood, yielding rents, or which may be made to yield rents;) to invest such parts thereof, as they think proper, (such purchases to be approved by the Mayor, and City Council, of the City of Baltimore,) in such Real Estate; and also, when an opportunity or opportunities offers of acquiring such a tract, or tracts of land, as will be wanted for the Institution, (For the establishment of its Farm,) [at cheap rates,] to purchase them. The houses yielding revenue, as also those of the "School Farm," I recommend, and direct, to be kept constantly insured against the risk of Fire, so, that if an accident should occur, there would be means to reconstruct them.—I recommend also to the Directors, (to be elected as aforesaid,) to apply to the Legislature of the State of Maryland, for an act of Incorporation, for said Institution; (subject always, however, be it understood, to the conditions, herein provided for.) And for the purpose of setting forth and explaining, more particularly and fully, (if possible,) my intention and desires, in relation to this institution, I will add, that the object I have in view, (and which occupies my whole soul, my desires, and my affections,) in founding this Institution, *Is the great one, of rescuing from ignorance, and idleness, and of a consequence from Vice, and ignominy, Millions upon Millions of the destitute Youth, of the large Cities of the United States, and the bringing them up, in Knowledge and virtue, to industry and labor, to such an Age as, (their principles, being fixed and stable,) they can be apprenticed out to worthy and honorable men, for the acquirement of the various Mechanical Arts, and by that means, formed to be useful, and Saved to their Country and the World.*—(For that the neglect of education in Early life, (permitting children to live and grow up in idleness and ignorance,) is the most fruitful source of Crime, none will deny; If communities therefor would carefully guard, that no children grow up without education and employment, and provide a home for the Orphan, and offspring of the vicious, and those, who not only neglect to educate their children, but contaminate them by their own bad example, they will do much, very much, towards drying up the fountains of vice, and of lessening Crime;—It is not however the intellectual cultivation of youth, alone, which should be attended to, but their Moral, Physical and Religious cultivation, should, in a superior degree, occupy our especial care.)—In accordance then with this object, it is my desire, and I request the Directors (to be elected as aforesaid,) to purchase a tract or tracts of rich and productive land, (so that its product may assist, at least, to support the Institution;) in a situation high and healthy for the establishment of the Institution; to contain some Three hundred, Four hundred, Five hundred, a Thousand, Two or Three thousand acres, more or less as may be wanted; laying within one, two, three, five, ten or Twenty miles, (or even, a greater distance,) of the City of Baltimore; (as the Directors may determine,) whereon, (under such regulations, as the Directors, to be elected as aforesaid shall establish;) the said Youth, shall labor in all work appertaining to the cultivation of the earth; Say, In plowing, hoeing, harrowing, Spadeing, Mowing, reaping, gathering, housing, thrashing, Sowing, planting, gardening, Carting, waggoning, making of all Agricultural instruments, rearing, and attending to animals, rearing, and attending to the Silk Worm and the Mulberry Tree, &c. &c. &c. at the same time that they are progressing in their education; until such a period as they attain the proper age, when, (their education completed,) they shall be apprenticed out, for the acquirement of the various Mechanical Trades.—It is my desire, and I request the Directors (to be elected as aforesaid,) to rear up to labor, educate and support in said Institution as great a number of the poor, and destitute Male Children and youths, of the different Maritime Cities of the United States, [which are too generally *hot beds* of vice,] (taking those first, which belong to the City of Baltimore; then, those from the Towns and Villages of the State of Maryland; and Thirdly, those from the different large Cities of the different States of our Happy Union; paying the expenses of their removal from their homes, to the Institution;) as the revenue of rents, arising from the real estate of this bequest, and from the Farm, will support, which I hope will be at least to the number of One to Two thousand; and in time, I hope (with wise management may be made to support Ten thousand.—It is my wish and desire, and I request the Directors, (to be elected as aforesaid) to erect the buildings of the Institution, in Stone, or brick, in a style of taste and elegance, but plain, of

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great solidity, (intended to stand for ages.) Airy and of proportionate Elevations.—In closing those my explanations and desires in relation to this, the Institution of the "School Farm," It will be permitted me, to express my conviction that this Institution will not long remain the only one, of the kind, in the vicinity of that Noble, Philanthropic, and high minded City, But that a Sister one, will be soon made to spring up, by its humane and generous Sons, (an offering on the Alter of Charity,) destined to rescue from ignorance and vice, the Female Children and Youth of the Poor, the destitute and vicious of our Country.

And for the management of the General Estate, or fund, for the education of the Poor, which I, have herein willed and bequeathed, to the Mayor, Aldermen, and Inhabitants, of the City of New Orleans, in the State of Louisiana, and the Mayor, Aldermen and inhabitants of the City of Baltimore, in the State of Maryland, and their Successors, forever, I hereby declare, that my intention, is not, that any part of said General Estate, or revenue from Rents, arising from said General Estate, shall go into the hands of the Corporations, of said Cities; But that they, the said Corporation, shall for ever have a supervision over it;—I therefore in consequence, request, authorize, and direct, the respective City Councils of the Three Municipalities of the City of New Orleans, on the First Monday of January, of each and every year, to elect one respectable Citizen, out of each of said Municipalities, who shall be a resident therein, (but who shall not be members of said City Councils at the time,) who shall be Commissioners of the General Estate;—Which Three Commissioners, so elected, shall serve for the term of Twelve Months, and until a New Election, on the first Monday of January of the following year, shall be made, by the said City Councils, of Three Commissioners, to replace those of the preceding year, (none of whom shall be eligible as Commissioners, for two consecutive years,) and so on, from year to year, to the end of time; and the Three Commissioners, so named, in Conjunction with the Three Agents to be appointed, (as hereinafter directed) by the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, (Which Three Agents) so named by said Mayor and Aldermen of the said City of Baltimore, shall have equal powers, with said Three Commissioners, elected by the City Councils, of the City of New Orleans, and an equal vote, on all affairs of business, as they will represent an equal interest.) Shall have the sole management of said General Estate, the Leasing and renting of all its lands, lots of ground, houses, &c. &c, the cultivating of its estates, with the black people thereon (if any Estates are in cultivation at the time of my death,) the crops, made on which Estates, when sold shall be considered rent; The collecting of its rents, leases &c. &c. and the giving receipts therefor; the paying of the Annuities as herein before ordered and bequeathed, and in fine, doing all acts necessary to its full and perfect management, as herein pointed out and directed. For this purpose, they will take an office, in some Fire proof house, in the City of New Orleans, employ a Confidential Clerk or Secretary, and keep regular Books, accounts, &c. &c.—They, the said Commissioners, and Agents, of my General Estate (to be named as hereinbefore and hereinafter provided for,) are hereby permitted, directed and Authorized by me, (if they should see fit, and proper so to do,) at such time, as the Fifteen years, are near expiring, during which the Slaves are to labor for my General Estate, after my death, before being sent to Africa, to take the nett amount of two or three crops of such Estates, as they are cultivating, and purchase therewith, an equal number of Slaves, (if there is still Slaves in our Country for sale.) with those, they are about to send away; which Slaves, so purchased, shall labor on the plantations, belonging to the General Estate, for fifteen years, from the day of their purchase, and after said Fifteen years of service, be also in their turn, sent to Africa; and their number may be again renewed by purchase, in the same mode, and manner; serve also fifteen years, and be sent to Africa; and so on, as often as the Commissioners and Agents of the General Estate, may see fit and proper, and that there is Slaves to be purchased, by which means, a two fold object, would be accomplished, Viz: a revenue from the Estates cultivated, greater than what they would yield, by renting them out; and the returning every Fifteen years, an additional number of the human race, Christianized and Civilized, to the land of their forefathers.—My Executors, (herein after named,) will hand over to said Commissioners and Agents of the General Estate, of the City of New Orleans, and of the City of Baltimore, all the Title deeds of my real Estate, with

all other papers, and documents not necessary to them, the said Executors, to be deposited in said office;—They the Commissioners, of the General Estate of the City of New Orleans, and Agents, of the General Estate of the City of Baltimore, to consider themselves, at once in possession, (as I hereby give them Seisin, and put them in possession,) of all said real Estate, from the day of their nomination; (which nomination I recommend the City Councils of the City of New Orleans, and the Mayor and Aldermen, of the City of Baltimore to make, immediately after my decease.) And on the settlement and winding up, of my Affairs, by them, the Executors, (herein after named,) they will place all my Books of accounts, papers, &c, &c, in the hands of the Commissioners and Agents of the General Estate, to be named by the City Councils of the City of New Orleans, and the Mayor and Aldermen of the City of Baltimore, to be placed in said office, for safe Keeping.—And at the end of each year, (or half year, as may be thought best,) after the payment of the different Annuities and all other attending expenses; the Commissioners appointed by the City Councils, of the City of New Orleans, and the Agents, representing the Mayor, Aldermen and inhabitants of the City of Baltimore, will settle their Accounts, each party dividing, and taking the one half, of the remaining nett revenue of the year, for the intents and purposes, as herein before, and hereinafter ordered and directed.—The Agents representing the City of Baltimore, will remit the amount received by them to the Commissioners, named in Baltimore; and the Commissioners elected by the City of New Orleans, will receive the proportion, accruing to the said City of New Orleans, carry it to the Account of the Public Free Schools Fund, in one of the Banks, in the City of New Orleans, and Keep Separate Books, and Accounts, for said Fund, and of every thing in relation to the Public Free Schools.—(The management of the Public Free Schools, of the City of New Orleans, and its Suburbs, and the Fund belonging to said Schools, the Agents of the City of Baltimore, have no power over, or concern in.)—Certified copies of the accounts of the General Estate Fund, shall be forwarded to the Corporation of the City of Baltimore, annually, to be examined by it and published in Two, of the Newspapers of that City, and the Corporation of the City of Baltimore shall also, publish in two of the Newspapers of said City, annually, a Copy of the Accounts of the Free Schools Fund, its disbursement, and state, with a statement of every thing relative to said Free Schools.—Copies also of the Accounts of the General Estate Fund, shall be delivered to the City Councils of the City of New Orleans, who shall name a Committee from their own Body, to visit the books, examine and Audit the said accounts annually, and at all other times, when they may think proper; (as well, the accounts, of the General Estate, as of the Free Schools Fund,) and keep up and Support, a general Supervision, over the General Estate, its accounts, Funds, management, and real Estate, as also over the Free Schools, and every thing that relates to them.—The annual accounts, as well of the General Estate, as of the Free Schools Fund, shall be published in Two of the Newspapers of the City of New Orleans, with a particular statement of the situation of the Schools, and every thing concerning them.—It is my wish and I direct the Commissioners, for the City of New Orleans, (to be named as herein before and herein after set forth,) to establish as many Schools, as may be necessary and wanted; so that, if possible, every poor child and youth, may receive an education. The Schools should be established in different parts of the City of New Orleans, its Suburbs, Liberties, and outskirts, in such situations, as would be nearest the residences of the poorer Classes, for whom those institutions, are alone intended;—They will invest such part of the Fund; as will annually accrue to the Mayor, Aldermen and inhabitants of the City of New Orleans, from the revenue of rents, of the General Estate, as will be necessary, in the purchase of suitable lots of ground, and the erection of proper and permanent buildings, in Brick, for the Schools, and places of residence, for the Teachers; and the residue of the fund, will be made use of, for the payment of Teachers, for Books, Stationery, and other attendant and necessary expenses.—And I request, Authorize and direct, the respective City Councils of the Three Municipalities of the City of New Orleans, on the *Second Monday of January of each and every year*, to elect, Two (other) respectable Citizens, as Commissioners, out of each of said three Municipalities, who shall be resident, in said respective Municipalities, from which they shall be elected, (but who shall not be members of said City Coun-

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cils at the time,) which will be Six Commissioners; and with the three Commissioners, to be elected by the said respective City Councils, of the three Municipalities of the City of New Orleans, *On the First Monday of January of each and every year*, (as herein before provided for,) will make *nine* Commissioners, in ALL; who shall be Commissioners, for this purpose;—which Commissioners so elected, shall serve for the term of twelve Months, and until a new election, *on the Second Monday of January*, of the following year, shall be made by the said City Councils, of the three Municipalities, of the City of New Orleans, of commissioners, to replace those of the preceding year, (none of whom shall be eligible, as Commissioners, for two consecutive years,) and so on, from year to year, to the end of time.—and the said Six commissioners, (to be named as aforesaid,) shall have equal powers in the management of the Free schools Fund, (which will accrue to the Mayor, Aldermen, and Inhabitants of the City of New Orleans, in the State of Louisiana, annually, from the revenue of rents, of the General Estate,) the Schools established under it, and every thing in relation to it, with the Three commissioners, (to be named, [as herein before provided for,] by the said City Councils, of the Three Municipalities of the City of New Orleans, *On the First Monday of January, of each and every year*.) *But they, the said Six Commissioners*, (to be named as aforesaid, by the said City Councils of the Three Municipalities of the City of New-Orleans, *On the Second Monday of January, of each and every year*,) shall have no power, concern, or management, in the affairs of the General Estate;—*As the affairs of the said General Estate* are to be managed, transacted, and conducted, *solely and exclusively*, (as herein before, and herein after provided for,) by the Three Commissioners, to be named *On the First Monday of January, of each and every year*, by the City Councils of the Three Municipalities of the City of New Orleans, in the State of Louisiana, and the Three Agents, to be named by the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, and by them only.—And I request, authorize, and direct the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, *On the First Monday of January, of each and every year*, to elect one Respectable Citizen, out of each Ward of said City, its suburbs, Liberties and outskirts; but who shall not exceed Nine in number, nor be members of said City Council at the time, who shall be Commissioners for this purpose; which Commissioners, so elected, shall serve for the term of Twelve months, and until a new election, *on the First Monday of January* of the following year, shall be made by the said Mayor and Aldermen, of Commissioners, to replace those of the preceding year, (none of whom shall be eligible as Commissioners for two consecutive years,) and so on, from year to year, to the end of time; and the said Commissioners, (named as aforesaid,) will take an Office, in some part of the City of Baltimore, employ a confidential Clerk, or Secretary, and keep regular Books and accounts, showing the application, and disbursement of all sums of money, which will come into their hands, from the Agents appointed by the Mayor and Aldermen of the City of Baltimore, (in manner as hereinafter set forth,) to represent their Interests in the City of New-Orleans, and to receive and remit it to them;—And the said Commissioners, (to be named as hereinbefore provided,) will establish as many schools as may be necessary, and wanted, so that, if possible, every poor child, and youth, may receive an education.—The schools should be established in different parts of the said City of Baltimore, its suburbs, Liberties, and outskirts, in such situations as will be nearest the residences of the poorer classes, for whom those institutions are alone intended.—They, the said Commissioners, will invest such part of the Fund, as will annually accrue to the Mayor, Aldermen, and Inhabitants of the City of Baltimore, from the Revenue of Rents of the General Estate, as will be necessary, in the purchase of suitable Lots of ground, and the erection of proper, and permanent, buildings, in brick, or stone, for the schools, and places of residence for the Teachers; and the residue of the Fund will be made use of, (as far as wanted therefor,) for the payment of the Teachers, for Books, stationery, and other attendant and necessary expenses.—The Mayor and Aldermen, of the City of Baltimore, will appoint annually, (or as often as they may see fit and proper,) a committee, from their own Body, to visit the Books, and accounts, kept by said Commissioners of the Free schools fund, to examine and audit said accounts; and will keep up, and support, a General supervision over the said schools, their management, expenditures, Funds, and every thing that relates to them.—And

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for the purpose of managing the affairs of the General Estate, or Fund, in the State of Louisiana, in which the City of Baltimore is equally interested with the City of New-Orleans; I hereby authorize and direct the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, to elect, appoint, and name, from time to time, as they may see fit and proper, (and to change them and name, elect, and appoint others in their lieu and place, at any time they may see fit and proper,) Three persons, as Agents in the City of New-Orleans, (or whom they may send to said City of New-Orleans,) to represent their interest in said General Estate, and to act for them in all respects, and in all things which concern said General Estate;—Which said Three Agents shall jointly, with the Three Commissioners to be appointed by the City Councils of the City of New-Orleans, manage, conduct, and administer, in all respects, said General Estate as herein before, and herein after, provided for and set forth; and shall have an equal power and an equal vote, (in all affairs which concern said General Estate;) with the said Three Commissioners, to be appointed as herein before provided for by the City Councils of the City of New-Orleans.—I recommend to the Commissioners, to be appointed by the City Councils of the City of New-Orleans, and the Agents, to be appointed by the Mayor and Aldermen of the City of Baltimore, to represent their respective interest in the General Estate, in the City of New-Orleans, to keep all such houses and buildings, as belong to the General Estate, or may hereafter belong to it, regularly insured against all risk by Fire, by which means, in case any of said houses, or buildings, should be destroyed by said Element, the means would be ready to reconstruct them;—And to apply to the Legislature of the State of Louisiana, for an Act of Incorporation, (subject always, however, to the conditions provided herein,) of said General Estate.—I also recommend to the Commissioners, (to be elected as hereinbefore provided for,) as well those of the City of New-Orleans as those of the City of Baltimore, charged with the management of the Free Schools, and the Free Schools Fund, of said respective Cities, to apply to the Legislatures of their respective States, for Acts of Incorporation for their respective Free School Institutions, (subject always, however, to the conditions provided herein,) should it be found necessary and desirable to have said Institutions incorporated.—No compromise shall ever take place between the Mayor, Aldermen and Inhabitants of the City of Baltimore, in the State of Maryland, and the Mayor, Aldermen and Inhabitants of the City of New-Orleans, in the State of Louisiana, and their successors, in relation to their respective rights in said General Estate; nor shall one party receive from the other party, by agreement, a certain sum of money, annually, (or otherways) for their respective proportions in said General Estate;—nor shall either party sell their respective rights, under this Will, in the said General Estate, to one another, or to others; But said General Estate shall for ever remain, and be managed, as I have herein pointed out, ordered and directed.—And should the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, and the Mayor and Aldermen of the City of New-Orleans, in the State of Louisiana, or their successors in Office, combine together, and knowingly and willfully violate any of the conditions, hereinbefore and herein after directed, for the management of the General Estate, and the application of the Revenue arising therefrom; Then, in that event, I Give and Bequeath the rest, Residue, remainder, and accumulations of my said General Estate, (subject always, however, to the payment of the aforementioned annuities,) to the States of Louisiana and of Maryland; in equal proportions, to each of said States, of half and half, for the purpose of educating the poor of said States, under such a General system of education as their respective Legislatures shall establish by Law.—(Always understood and provided however, that the Real Estate, thus destined by me for said purpose of Education, shall never be sold, or alienated, but shall be kept and managed as they, the said Legislatures of said States, shall establish by Law, as a Fund, yielding rents, for ever;—The rents only of which General Estate shall be taken and expended for said purpose of educating the poor, of said respective States, and for no other,) and it is furthermore my wish and desire, and I hereby Will, that in case there should be a Lapse of both the Legacies to the Cities of New Orleans, in the State of Louisiana, and Baltimore, in the State of Maryland, or either of them, wholly or in part, by refusal to accept, or any other cause, or means, whatsoever; Then, both, or either of said Legacies, wholly, or partially so Lapsed, shall Inure, as far as it relates to the City of New-Orleans, to the

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State of Louisiana, and as far as it relates to the City of Baltimore, to the State of Maryland, that the Legislatures of those States, respectively, may carry my intentions, as expressed and set forth in this my last Will and Testament, into effect, as far, and in the manner, which will appear to them most proper.—(It will be permitted me here to observe, that I am, and long have been, convinced, that the First, most imperative and sacred duty which each and every Government on Earth is bound to perform, (and which Rulers and Legislators cannot avoid the performance of, but under the heaviest responsibilities to Heaven;) Is that of providing by Law for the education of every child within the limits of their respective Governments;—To that effect, Parents, and guardians of youth should be made, under heavy penalties, to send their children to schools, supported, (under a system of general taxation on real estate;) at the sole expense of the Government.—) Now, with the view of setting forth, and explaining more fully, and more particularly, (If tis possible,) my desire, and intentions as expressed in the foregoing dispositions of this my Last Will and Testament, in relation to my General Estate, I will add, that the First, principal, and chief object I have at heart, (the object which has actuated and filled my soul from early boyhood, with a desire to acquire fortune;) is the education of the poor, (without the cost of a cent to them;) in the cities of New-Orleans and Baltimore, and their respective suburbs, in such a manner that every poor child and youth, of every color, in those places, may receive a common English Education; (*Based however, be it particularly understood, on a moral and religious one*;—That is, the pupils shall, on particular days, be instructed in morality and Religion; and school shall be opened and closed, daily, with Prayer.) And in time, when the General Estate will yield the necessary Funds, (for, in time, its revenue will be very large,) over and above what will be necessary, to the education of the poor of those Two cities, and their respective suburbs;—It is my desire, and I request, that the blessings of education may be extended to the poor throughout every Town, Village and Hamlet in the respective States of Louisiana and Maryland; and was it possible, through the whole of the United States of America.—For this purpose, and this only, (my desire being, that one dollar shall never be expended to any other purpose;) I destine the whole of my General Estate, (excepting only my black people, the legacy bequeathed the children of my sister Jane, and that to herself;) to form a Fund, in Real Estate, which shall never be sold, or alienated, but be held, and remain, forever, sacred to it alone.—The nett annual Revenue of Rents of said General Estate, to be equally divided, (one half to each,) between the said Two Cities of New-Orleans and Baltimore, so soon as the annuities are paid off, which I have charged the General Estate, or Fund, to pay; the last of which annuities will probably be paid off in forty, or fifty years, from and after my death; from which period, (the time when said annuities will be paid off,) the whole Revenue of Rents, arising from said General Estate or Fund, will be received for the sole purpose of educating the Poor, as I have hereinbefore set forth;—and in the mean time, (the time between the period of my death and the period when said annuities will be paid off, in totality,) The one half of the revenue of Rents, arising from said General Estate, or Fund, is destined to said purpose.—In the course of my observations, through a long life, having seen almost every bequest or endowment, of the nature of those I have herein made, perverted, after a certain lapse of time, from their intended purposes, and either sold, or so changed, as to serve other and private ends; I determined therefor, in consequence, by placing one City and its agents, or representatives, as a check over the other, to guard, by that means, the interests of both;—This arrangement, I hope, will become the means of carrying down to the latest time this bequest, and secure its application forever to the purposes intended by me.—It would have been an easy matter for me to have purchased Real Estate in the City of Baltimore for the one half of the amount of my Estate, but then, had I so done, my object would not have been accomplished; the danger of its alienation, and having it turned aside from its original intent, would have existed in full force.—To avoid which, I placed the whole of it in one City and State, and made another City and State equally interested in its preservation and correct management, for the mutual benefit and security of both.—I trust the most High will Bless the intention, and render it effectual.—The mode I have thus adopted will also serve, I trust, as a Ligature, (though but a small one,) to bind the different parts of our Country together; and should it be found, on trial,

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to work well, may induce other well wishers of their species, and the Institutions of our Common Country, to do the same, and thereby bind together other Cities and States of our Greatly Blessed and happy Country in Brotherly Affection and love to the latest time.—I have also long seen with regret that a spirit, inimical to the Rich, is felt and entertained by the Poor, nurtured and kept alive in their bosoms, as it is, by designing and bad men for their own wicked purposes;—They are told that the Rich are their natural Enemies, that the God of Nature made all men equal, and that it is sinful for one man to appropriate to himself more of the Riches of this World than his neighbor;—with much more, to the same purport;—Believe it not my Friends;—Be assured that they, who tell you so, are your greatest enemies; the enemies of your peace and happiness.—Those feelings of Jealousy, which the poor entertain of the Rich, are wrong; It is sinful, and contrary to the laws of our Divine Creator, who has shown in his works, (as in his words,) that he did not intend a perfect equality to exist among men,—as he has not made all men equal in strength, in stature, or intellect, neither have his decrees established an equality of fortune. Let man, then, bow with humble resignation to the Divine Will.—The Poor should look on the Rich in the light in which they really and truly stand towards them; that is, as Reservoirs, in which the most High makes to flow the Rich streams of his Beneficence, to be laid up and husbanded for his all wise and all seeing purposes; and for seasons of distress and affliction to the poor. Instead, then, of looking on them as their greatest enemies, they should, on the contrary, consider them, as they really are, their best friends.—This is the position all rich men, (whose hearts occupy the right place in their bosoms,) stand in towards the poor.—*Besides*, Let the poorer classes of the World be consoled, assured that the Labor loving, Frugal, Industrious, and Virtuous among men, possess joys and happiness, in this life, which the Rich know not, and cannot appreciate,—so well convinced am I, (after a long life and intercourse with my fellow men of all classes,) of the truth, “that the happiness of this life is altogether on the side of the virtuous and industrious Poor.”—That, had I children, (which I have not,) and a fortune to leave behind me at death, I would bequeath, (after a virtuous education, to effect which nothing should be spared;) a very small amount to each; merely sufficient to excite them to habits of Industry and frugality, and no more.—As the poor man's friend, then, I recommend to him to honor and respect the virtuous rich, and to lay those observations to their heart, and store them up in their mind;—And to the Rich, I would say, (If they see aught in them corresponding with their own feelings, and worthy of their regard;) “Give them an occasional reflection.”—Hoping thereby that the world may advance in happiness, in virtue, and Holiness.—I request my Executors, (hereinafter named,) to see that my funeral is plain, made without parade, and with the least possible Expense.—And, (I was near forgetting that,) I have still one small request to make, one little favor still to ask, and it shall be the last; It is that it may be permitted, annually, to the children of the Free Schools, (situate the nearest to the place of my interment,) to plant and water a few flowers around my grave.—This little act will have a double tendency; it will open their young and susceptible hearts to gratitude and love to their Divine Creator, for having raised up, (as the humble instrument of his bounty to them,) a poor, frail, worm of earth, like me, and teach them, at the same time, “What they are, whither they came, and whence they must return.”—And to enable my Executors (hereinafter named,) to execute this my last Will and Testament, I hereby give unto them, Seisin of all my personal Estate, say, Money, Stocks, and Bonds on hand; as well as all debts owing to me by Bills, Notes, Bonds and Mortgages, deeds, or Book accounts; as also the furniture and effects in and about the house in which I reside; cattle, horses, &c., &c., putting them in possession thereof, and authorizing them, my said Executors, (hereinafter named,) to recover and receive the amount of all said Stocks, Bonds, Bills, Notes, Bonds and Mortgages, Deeds, Book Accounts, &c., &c.; with all dividends and interest which may accrue thereon; and to sell said furniture and effects.—And likewise to pay all debts owing by my Estate to others, should there be any debts owing by it.—In the different Acts of incorporation contemplated and mentioned by me, in this my last Will and Testament, to be passed by the Legislatures of the States of Louisiana and Maryland, for the purpose of carrying out the objects I have in view; It is my wish and desire, that there shall be an express provision in each of said acts of

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Incorporation, prohibiting the Administrators, or Officers, of the respective Corporations from ever selling, or alienating, in any manner whatever, the Real Estate, acquired in any way, either by purchase, (by means of the Funds arising from and received under this Will and Testament;) or otherways, and held, and owned by said corporations.—FINALLY, I nominate and appoint *Christian Roselius, Judah Touro, Abial Daily Crossman, Lewis Philip Pilié, Jonathan Montgomery, Joseph A. Maybin, William E. Leverich, and François Bizoton D'Aquin*, (all Eight of the City of New-Orleans, in the State of Louisiana,) *Benjamin C. Howard, John P. Kennedy, John Spear Smith, Brantz Mayer, Henry Didier*, (Merchant,) and *John Gibson*, son of the late William Gibson, Clerk of the Court, (all six of the City of Baltimore, in the State of Maryland;) *Henry Clay*, of the State of Kentucky, the present President of the American Colonization Society of the City of Washington, in the District of Columbia; *R. R. Gurly*, Secretary of the American Colonization Society of the City of Washington, in the District of Columbia; and *Walter Lowrie*, Secretary of the Board of Foreign Missions, of the Presbyterian Church of the City of New York, State of New York, *Executors* of this my Last Will and Testament.—(And in the event of the death of *François Bizoton D'Aquin*, previous to my decease, then I nominate and appoint his Brother, *François Adolph D'Aquin*, to replace him as an Executor of this my Last Will and Testament.) and give to said Executors, *Christian Roselius, Judah Touro, Abial Daily Crossman, Lewis Philip Pilié, Jonathan Montgomery, Joseph A. Maybin, William E. Leverich, François Bizoton D'Aquin, Benjamin C. Howard, John P. Kennedy, John Spear Smith, Brantz Mayer, Henry Didier, John Gibson, Henry Clay, R. R. Gurley, and Walter Lowrie*, full powers, without the interference of Judicial or extra Judicial Authority, to carry the same into effect, according to the true intent and meaning thereof.—Authorizing and empowering, as I hereby do, (in the event of absence from the State, refusal to qualify, resignation, or death of the other Executors;) any Three of the said aforementioned Executors to act and carry out my intentions under this my last Will and Testament. Recommending to them, (my said Executors,) to see that said intentions are, in all respects, strictly complied with.—And I do hereby revoke and annul all other Wills heretofore made by me.

In witness whereof, I, the said John McDonogh, have, to this my last Will and Testament, (the whole written, dated, and signed with my own hand,) contained on Twenty four pages, placed my signature at the foot or Bottom of each page, and my Seal and signature at the foot or bottom of this my Last Will and Testament, on the twenty fourth page.—This, my said Last Will and Testament, executed [from motives of prudence] in duplicate, in my dwelling house, in the town of Macdonogh, State of Louisiana, on this the twenty ninth day of December, in the year of Our Lord, Eighteen hundred and thirty Eight. (1838.) [Signed,] JOHN McDONOGH. [SEAL.]

MEMORANDA OF INSTRUCTIONS to the Executors of John McDonogh, to be opened and kept by the Executors.

MEMORANDA: Being reflections, opinions and recommendations, addressed by John McDonogh to the Executors of his Estate, named in his last Will and Testament, and to the Commissioners and Agents, (to be appointed by the City Councils of the City of New Orleans, and the Mayor and City Council of the City of Baltimore,) of his "General Estate," as said Memoranda, recommendations, &c., &c., may, he hopes, be of service to them, in various ways, in the winding up of said Estate, and in the management of the General Estate. He requests they may be copied into one of the books kept in the office of the General Estate, for preservation, reference and use.

The inventory of my Estate (as directed by my Will,) to be made out by a Notary Public, (assisted by my Executors,) must remain on record in the office of said Notary Public, in his current book of Record, from which my Executors will be pleased to obtain certified copies, and have them placed, say, one copy in the archives of the City Councils of the City of New Orleans; one copy in the City Council of the City of Baltimore; one copy in the office of the General Estate in New Orleans; and another copy in the office of the Free Schools and the Free School Fund in the City of Baltimore, in the State of Maryland; all for safe keeping; so that if an accident or accidents should happen to one,

or more copies of said Inventory, other copies thereof would be safe. It will also be copied from those original and certified copies into the books of those Institutions of said offices.

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And whereas all the land papers and title deeds of my Real Estate, of every kind and nature, will remain and be placed, for safe keeping, in the office of the General Estate, in the City of New Orleans, under the care of the Commissioners and Agents of said General Estate. I request said Commissioners and Agents, (as it is most important that all said papers, documents, and title deeds, should be carefully preserved; said General Estate being deeply interested in in their preservation and safe keeping,) to have certificate copies taken of each, and every land title paper, (many of them being the original title deeds, of which no record or copy exists, but those in my possession,) and title deed, officially, (that is, Notarial copies of each and every one of them, duly certified by the respective Notaries Public, before whom they were originally executed, and then legalized by the Governor of the State. And to be still more particular and exact, (knowing as I do the great importance of the object,) I mean, a copy of each paper or document, through the whole chain of title, up to the originals, (and including originals,) from the different Governments of France, Spain, and the United States of America, in each and every title to each separate piece of property,) and said copies or duplicates of each and every land paper, document or title deed, (a complete set of copies of the whole series of documents or title deeds,) to be remitted with the greatest care, by some safe private conveyance, to the Commissioners of the Free Schools, and Free Schools fund, in the City of Baltimore, in the State of Maryland, to be placed in the office of said Institution for preservation and safe keeping. In the event that should an accident take place in either City, and one set of copies be lost by fire or otherways, that they might be immediately after replaced by another series of copies; so that two sets of copies may, if possible, for ever exist, one set in each City of New Orleans and Baltimore. I request also, that duplicate copies of all plans of land and lots of ground, laid out and divided into lots and squares, may be made out and remitted to Baltimore, with full and complete lists of all the property belonging to the General Estate, with descriptions of its precise situation, measurements, prospects, value, &c., &c.; by which means, each office in each City, will be in possession of all information relative to said General Estate, and of duplicate copies of every document, title deed, plan, &c., &c., appertaining and belonging to said General Estate. And which they, the said offices of said Institutions, (besides having and preserving the original copies,) *will have copied in each office*, in a Book kept for the express purpose, as a still further security to their preservation.

And whereas, in every thing that will concern the management of the General Estate, from the most important of its affairs to the most minute; from the keeping of its books and documents, to the leasing and renting of its Real Estate; from the receiving and collection of said rents, to the care and preservation of its Estates, houses, &c., &c., and more especially to the gradual increase of its revenue. Much, very much, will depend on the honor, probity, wisdom, and business talents and habits of the gentleman who will be appointed its Secretary. It will be permitted me then to recommend, that great care and precaution should be at all times used in the making of this appointment, and no one entrusted with it that did not stand high in the estimation of their fellow citizens for all those qualifications. *Besides*, the engagement taken with him (whoever he may be,) should only be during good behaviour, and satisfaction given by him, in all respects, in the fulfilment of the duties of the office. And if it should so happen at any time, that a Gentleman possessing all the necessary qualifications to fill the office, could not be met with, or obtained here, in the City of New Orleans, that then such a one should be sought for in some other parts of the United States, and induced to come here, to act as its Secretary, under a good salary for his services.

As it will be very important to have the Institution of the General Estate incorporated by a Law of the Legislature of the State, I recommend in consequence to the Commissioners and Agents of the General Estate, to apply to said body, by memorial at its first Session, after their appointment, for the passage of such a Law. Recommending that said Memorial should be given for presentation to some of the most influential members of said body, and their

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support of it, through the respective Houses, requested. Perhaps the Governor of the State, if spoken to, would make mention of it in his annual Message to that body, and recommend the passage of a law for its incorporation; seeing the object and vast importance of the Institution to the State and the world.

So soon as the law, (by the Legislature of the State,) incorporating the Institution of the General Estate, shall be passed, I recommend to the Commissioners and Agents of said Estate, immediately after, to apply by memorial to said Legislature, (and to every subsequent Legislature, until the demand is accorded,) for a law exempting forever from taxation, *All property, real and personal*, belonging to said General Estate, (or which may hereafter belong to it,) laying within the State of Louisiana; seeing the purposes to which it is destined. I trust that the wise and enlightened members composing the Legislature of the State of Louisiana, will not refuse the passage of such a Law; seeing that the whole and entire revenue of said Estate goes to Charitable uses in the State, and to the education of its own citizens; saving thereby to the State itself an immense expenditure, which would otherways have to come out of its coffers.

Similar applications to the last, recommended above, should be made to the different City Councils of the City of New Orleans, praying that the Real Estate laying within the respective limits of the different Municipalities, belonging to said General Estate, should be exempted forever by Law from all taxation, seeing the uses to which its revenue is forever destined.

So soon as the Law (by the Legislature of the State) incorporating the Institution of the General Estate, shall be passed, I recommend the Commissioners and Agents of said Estate, immediately thereafter, to apply by Memorial to said Legislature, (and to every subsequent Legislature until the demand is accorded,) praying that an Act may be passed, providing that no prescription shall ever run against any Real Estate belonging to this Estate, which shall be taken possession of or held by others. The object in such Law would be, that whereas, much land belonging to this Estate, lays in various out parts of this State, persons might, unknowingly to the Commissioners and Agents of the General Estate, seat themselves down on it, and, if permitted to remain thereon for thirty years, (the present law of prescription of the State being such,) would acquire title thereby; such law would, therefore, protect it forever.

After the passage of the law, (by the Legislature of the State,) incorporating the Institution of the General Estate, I recommend to the Commissioners and Agents of said Estate, to apply by Memorial to said Legislature, (and to every subsequent Legislature, until the demand is accorded,) praying that an Act may be passed appointing the Secretary of the General Estate, (for the time being, whoever he may be,) an Auctioneer, for the purpose of leasing at public auction the lots of ground and other Real Estate, belonging to said General Estate. The object of this would be that the General Estate might have its own confidential Auctioneer to transact its business, (as all its leases should be publicly made at auction after due notice, by advertisement in the public newspapers of the City,) and by that means, save also much expense in commissions, which would otherways have to be paid to auctioneers.

And whereas, Mr. Andrew Durnford, a free man of color, of the Parish of Plaquemines, of this State, is at this time indebted to me in a large sum of money, by mortgage on his sugar estate, situate in said parish; now, should it so happen, that at the time of my death, said debt still remains unliquidated and owing to me, I in that case request my Executors, (he being a worthy and an honest man, and my friend,) to wait the payment of said debt with him, Andrew Durnford, and to give him time to pay it off, on his paying an interest thereon of six per cent. per annum, for such time as they shall wait with him the payment thereof. Well understood, however, that the amount of the crop which he will make on his plantation, he will annually pay over to them on account of the principal and interest of said debt, until the whole amount thereof is liquidated and paid off.

And whereas, in my last Will and Testament, I did not, in relation to my old servants, (whose freedom I willed to be given them here, in New Orleans,) provide any support, (as I did not wish to add more writing than I could help, or add to its length,) I will now add a request to my Executors, that should any of them, from age or weakness, (as they are now all hearty and strong,) stand in need of support, that fifty cents a week may be paid to such of them as be-

come so situated, and that such be permitted to occupy one of the houses they have been accustomed to live in with me, until their decease.

I beg leave to recommend that when lots of ground are leased on long leases, the lessees should be bound to erect buildings of certain descriptions thereon, with foundations and walls of certain proportions, to raise and fill up the lots with earth, pay all taxes thereon during the term of the lease; comply with and fulfill all Municipal requirements; keep all houses and improvements placed thereon insured against risk by fire, &c., &c.; (which buildings, with all other improvements placed thereon, once erected, shall not be pulled down by the lessees, but shall revert back at the end of the lease, with the lot or lots of ground, to the lessors, free of cost or expense to them the lessors;) Said houses and lots of ground, after reverting back at the expiration of the first lease, improved as they will be, should be rented out on short leases, (the rent payable monthly,) at higher rates. By which means a large revenue will accrue to the Estate in a short lapse of time, which must greatly and yearly increase.

The mode and manner of leasing should be at public auction, putting up a lot to be bid off at the highest price offered for it, on such and such conditions, (say, those of filling up with earth, paying all taxes, complying with all Municipal requirements; building of certain descriptions and proportions, Insurance against fire, to insure the means of rebuilding in case of accident, &c., &c.;) under a lease of one year, five, ten, fifteen, twenty, or twenty-five years, as the case may be, paying an interest, (quarterly or quarter-yearly,) at the rate of six, seven, or eight per cent. per annum, as the case may be, on the price of the lot or lots of ground adjudicated.

Public sales should be made of lots of ground on lease in the City of New Orleans, as also in the rear of the City, say, on Poydras, Hevia, Perdido, Girond, Freret, St. Mary, St. Mark, and other rear streets; as well as in the rear of the Suburbs Livaudais and Washington, above and below the City, as in Macdonogh, according to the wants of the public and the demand for them. No large quantity of Lots should be thrown into the market at any one time, but the public should be supplied as space was wanted to build on. Say, a public sale of one hundred, two hundred or three hundred lots, (lots of thirty feet in front each,) every two, three, or five years, as wanted, and the prices high; that is to say, fair. However, on reflection, it would be well, perhaps, to lease out many of the rear lots, even at low prices, as the lessees would be improving, filling them up, and giving additional value to them.

And whereas, the Titles, under which I claim and hold certain lands, (laying principally in the State of Louisiana, some small part thereof laying on the Pearl river, in the State of Mississippi, and called the Florida grants,) which lands are the 15-16th parts, or fifteen parts out of sixteen parts, of (120,000 arpens) one hundred and twenty thousand arpens; original grantee Geronimo La Chiapella;—the (2-3rds) two thirds parts of (90,000 arpens) ninety thousand arpens; original grantees, Louis and Alexander Declouet;—and the (1-3d) one third part of (40,000 arpens) forty thousand arpens; original grantee, Valery John De Lassise;—are as yet unconfirmed by the Government of the United States, (although good and valid.) To assure, therefore, their confirmation, I request the two Cities of New Orleans and Baltimore, as also the two States of Louisiana and Maryland, through their respective Legislatures, to memorialize the General Government, praying it to confirm the titles to said lands; (seeing that they are the property of the poor of those two Cities, a Fund for their education, that they are in reality destined to do and accomplish that which is the Duty, the First and most sacred Duties of the General Government itself to perform and see performed, namely: to educate its citizens;) or otherways to give them (my General Estate) their choice of other public Lands laying in the State of Louisiana, in exchange for them or in their lieu and place, acre for acre; (seeing that the General Government have sold a great many of the Lands laying within my Surveys.) Which I trust and doubt not the General Government will do; (viewing the justice of the claim and the validity of the Titles; Indeed I consider those Titles already *virtually confirmed* by the Supreme Court of the United States, in their decisions in the suits of *Poster and Elam v. Neilson*; *Aradando* (I believe) *v. the United States*; *Perckman* (I believe) *v. the United States*, and others; (See also various reports of Committees, and Bills reported in Congress at various times; memor-

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ials from the Legislature of Louisiana; and especially an able report from the late Edward Livingston, when Secretary of State of the United States, when called on by a Resolution of Congress for information on the subject of those claims.) Those decisions of the Supreme Court of the United States are to the effect, that the Government of the United States are bound, under the Treaty with Spain of 1819, to confirm said titles. The Supreme Court not being competent to come to the relief of the claimants, it requiring the action of the General Government in the first place; it being a political question as to limits.) The citizens of Louisiana have cause to complain of the injustice of the General Government on the subject of our Land claims and Titles; (the Great, the crying injustice,) and none more than myself. From the Treaty of Paris of 1803, by which the United States acquired the Province of Louisiana, down to the present day, now thirty six years, our Land Titles remain unsettled and unadjusted. Had Congress passed a Law within a week after the ratification of said Treaty, as they were bound to do both by its letter and spirit, confirming every title to land within the limits of the Province ceded, which was a valid title under the governments of France and Spain, (which had preceded that of the United States in its occupancy and sovereignty,) the whole of the claims would have been adjusted at once, now thirty six years since. Instead of which, thirty six years on the contrary have passed away, and the claimants appear no nearer the termination of this state of uncertainty and ruin to them, than they were on the day of the ratification of said Treaty in 1803. Let justice then, (though late, when I am in the Grave and after a long life of supplication,) be done us at last. The General Government, in my claims at least, can have no objection to pass a law confirming them at once, (seeing that the Revenue to be derived from them is destined for the purpose of educating her own citizens, the children and youth of the two States of Louisiana and Maryland,) and in the case of the after claimants, passing a law permitting them to go into the Courts of the country for decision on their validity; under the condition that they, the claimants, shall take other Public Lands, acre for acre, for such part of their claims, (if confirmed by the Courts,) as have been confirmed by the United States to others, by right of settlement, or have been sold by the United States. Such were the provisions of a Bill which passed the Senate of the United States in Congress, at three different sessions of the last years, but was not acted on by the House of Representatives from the lateness of the session when sent from the Senate, as said Bill was not reached in its order previous to the breaking up of Congress. The Titles by which I claim those Lands are perfect in every respect; they are not simple grants or donations by the Ancient Government, but purchases from it for valuable considerations. They are not only stamped with every form required of the Local Government of Louisiana, Surveys, Plots, Patents, &c., &c., but were sent to Madrid, in Spain, and were ratified by the King in Council. Those Lands cost me large sums of money, acquired with God's blessing, by honest industry, and the sweat of my brow, Now thirty four and thirty five years since; and I have been deprived of their use and kept out of my property, rightfully and justly acquired, by a Government which styles itself honorable and just, a Government of the People; which Government for a long series of years has refused even to pass a law permitting the claimants to go before the Courts of the Country for a decision on their validity or invalidity of their claims; has cut us off, in short, from all means of obtaining justice in any way. Let it be permitted me now to ask, (an American by birth, an old man, one devoted to his country and its institutions, and whose father waded with the Father of his Country through the hottest battles of its revolutionary struggle for Liberty and Equal Laws,) would the most despotic Governments of Europe, (under a plighted faith, the faith of a Treaty,) have so acted? and to answer the question and say, they would not. Not one on the long list would have so acted—could have so acted. Justice would have been meted out to their subjects similarly situated within a month from the date of the Treaty Obligation. Besides on the score of interest, have the Government gained anything by so acting? No, but lost—immensely lost in various ways, (saying nothing of the loss of honor.) In addition to doing great injury to the State of Louisiana, by keeping the Land unsettled on, and waste, for upwards of thirty years, and her population sparse, when otherways she would have been filled up and compact. The whole quantity claimed by individuals, besides, is trifling, both in quantity

and value, and of no consideration, a drop in the bucket, as it were, to the General Government. The Florida claims (on those located between the Mississippi and Perdido Rivers) not exceeding in the whole (900,000) nine hundred thousand arpens, (french,) about 700,000 acres, "seven hundred thousand English acres," and the residue of the large claims of Louisiana, say Bastrop's, Maison Rouge, &c., &c., not exceeding $1\frac{1}{4}$ millions of French arpens, about 1,100,000 English acres.

For the base of a permanent revenue, (to stand through all time with the blessing of the Most High,) I have preferred the earth, "a part of the solid Globe." One thing is certain, it will not take wings, and fly away, as Silver and Gold, Government and Bank Stocks often do. It is the only thing in this world of ours which approaches to anything like permanency; or in which, at least, there is less mutation than in things of man's invention. The little riches of this world, therefore, which the Most High has placed in my hands, and over which he has been pleased to place and make me his Steward, I have invested therein, that it may yield (its fruits) an annual Revenue, to the purposes I have destined it forever.

Whereas, eight or ten more bricklayers, carpenters, painters, &c., &c., will be constantly wanted to attend to, and keep in repair and good order, the houses, buildings, fences, &c., &c., belonging to the General Estate, I recommend in consequence to the Commissioners and Agents of said General Estate, to employ Black mechanics, which shall belong and be owned by said General Estate, (so long as there are slaves in the country,) for said purposes, (letting them go out Free to Africa every fifteen years, and replacing them by others, whom they will purchase,) as a means of great economy, as otherways such repairs would be a source of great expence to the estate. In some of the vacant lots of ground, belonging to the Estate, they can have their workshops, for their mechanics, deposits of lumber, brick, stone, lime, sand, carts, animals, &c., &c. By all which means much expense may be avoided, and money saved to the Estate. And if buildings are to be put up on lots of ground in the City, or on the estates in cultivation in the country, owned by the General Estate, their own mechanics can erect and build them up.

The plan which my mind formed, (influenced, I trust, by the Divine Spirit,) and has pursued for near forty years, to accumulate and get together a large estate, in lands, lots of ground, in and near the City, houses, &c., &c., for the Education of the Poor, will in time, I doubt not, yield a revenue sufficient to educate all the Poor of the two States of Louisiana and Maryland, and perhaps the poor of many other States of our happy Union. To effect and secure that, I have laid its foundations deep and broad in and all around the City of New Orleans in every direction, so that for centuries to come, (if managed in wisdom,) its revenue must and will go on increasing in amount with the growth and extension of the City, (which is destined to be one of the greatest, in extent and population, the world has ever seen,) until its rents shall amount to some millions of dollars annually. If, therefore, those who will come after me, and will have the management of this store, (which I have strove to amass and pile up,) will labor to increase and render it productive with the same fidelity which I have husbanded it, and striven to make it a great one; then, indeed, it will become in time a huge mountain of wealth, and will yield its increase to the honor of God, and the benefit of generations yet unborn, through all ages of the world.

In relation to man's happiness, constituted as he is, I have always been convinced that the intellectual cultivation of the youth of our country, *alone*, without moral and religious cultivation, cannot secure it, or give permanency to the Free Institutions of the country, as they now exist. Education, separated from Religion, yields no security to morality and freedom.

I will now speak a few words of myself, (having often seen and felt that my conduct, views, and object, were not understood by my fellow man,) constrained as I feel myself to be, and bound so to do and to declare, that my soul has, all my life, burned with an ardent desire to do good, much good, to my fellow-man, (as it was chiefly by that means, and through that channel, that I could bend, greatly bend, to the honor and glory of my Lord and Master, which was my soul's first, great, chief object and interest.) I trust, I pray, that the mode I have adopted to effectuate it, will receive the Divine blessing. I have notwithstanding much, very much, to complain of the world, rich as well as poor.

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It has harrassed me in a thousand different ways. Suits at law, of great injustice, have been instituted and carried on against me, to deprive and take from me property, honestly acquired, (for I have none, nor even would have any that was not acquired by honest industry and the sweat of my brow,) and when obliged to seek justice through Courts of Law, (after waiting years and years with those who were indebted to me, and refused payment,) it has often and often been refused me. Many and many times have Juries of my fellow-men given me a stone when I asked them for bread. As one instance, (out of great numbers I could mention,) in a suit at Law instituted by me against a rich widow and orphans, (a succession estate,) for notes to a large amount, which I had endorsed for her husband in his life time, to serve him, (without any interest on my part, but through friendship,) and had to pay said notes, and against which there were no offsets, the lawyers for the defence, having nothing that they could urge or say, in addressing a jury of my fellow-men, why a verdict should not be given in my favor for the whole amount claimed, with interest and costs, confined themselves to repeating over and over, "Hold in mind, Gentlemen of the Jury, we pray you, that John McDonogh is a rich man and the defendants are a poor widow and orphan children;" "Hold in mind, Gentlemen of Jury, that John McDonogh is a man of unbounded wealth, who does not stand in need, or want the amount of those notes, and our clients are a poor widow and orphans who are ruined if you give him a verdict for the amount." And what, (will it be believed or credited,) was the verdict of this jury of my fellow-men? Why, that I should receive about the one-tenth part of the amount of the notes I had paid of the defendants, without interest or costs, and capped the climax by saying, "It was as much as the widow, they thought, could conveniently pay, and that I was rich and did not stand in need of it, could afford to lose it." On the same claim I applied for a new trial, which was granted me, and on its taking place before another, but a different jury, the same pleadings being made by the counsel for the defendants, viz: "Remember, Gentlemen, John McDonogh is a rich man—our clients are a poor widow and orphans." I obtained a verdict in my favor for the whole amount of my claim with interest and costs of Court. (Now, feeling those things, as I always have, most keenly, what is, let me ask, the duty of a juror, of a man? Is it to dispense that sacred attribute of the Divinity, Justice, equally to all men, or is it to consult the faces of men?) Of Judges, and their judgments, I have also much, very much, to complain—but I refrain. What care does it not become Governors and Legislators to use in their appointments to such offices; to secure high minded, honest, honorable and pure men. As I have said above, I again repeat, that I have much to complain of the world, of men in general. They said of me—he is rich, old, without wife or child, let us take from him, then, what he has. Infatuated men! they know not that that was an attempt to take from themselves, for I was laboring, and had labored all my life, not for myself, but for them and their children. Their attempts, however, made me not to swerve either to the right hand or the left, (although to see and feel so sorely their injustice and ingratitude, made me often to lament the frailty, the perversity, and sinfulness of our fallen nature.) I preserved an onward course, determined, (as the Steward and the Servant of my Master,) to do them good, whether they would have it, or whether they would not have it. And I have so strove, so labored to the last; the result is in the hands of Him who fixes and determines all results; he will do therewith as seemeth good unto himself.

Whereas, from infancy up, it has been the wish of my heart that my ashes should repose and mix in death with those of my earthly Parents; (as in this life there was nothing so loved by me, so dear to me, as my father and my mother,) and as they are interred in different graves, in some of the ancient places of burial of the City of Baltimore, (known to my sisters and their families, who reside there,) it is my wish, and I pray the Executors named in my last Will and Testament, (should it not be permitted me by the Most High to go on there before my death, and attend to and have it done myself, as I am very anxious and hope to do,) to take measures, (those gentlemen will excuse and pardon the great trouble I occasion and put them to,) and have a Family Vault, of lasting materials and great solidity, erected in some one of the new Burial places of said city of Baltimore;—to have the remains of my parents raised and placed therein, and my body sent on there, that it may be placed

alongside of theirs, in said vault, to crumble and mix with theirs, to await the resurrection at the last day.

I will now, with the view of communicating to the Commissioners and Agents of the General Estate my opinion in relation to certain parts and parcels of said Estate, throw a few notes together, and then close those memoranda.

The eleven entire squares of lots of ground (which contain upwards of three hundred lots) laying at the lower end of Poydras street, on both sides of said street, in the Second Municipality of the City of New Orleans, are very valuable. They should be laid out and divided into lots of 26 or 28 feet in front, by about 90 or 100 feet deep. A general plan should be made of each square, (as each square can be divided into upwards of thirty lots,) and said lots sold out on revertible leases of twenty-five years, (say 2 or 3 squares one year; in 2 or 3 years thereafter, 2 or 3 other squares, sold out and so on,) under certain conditions of raising them with care, building on them, paying taxes, and all other expenses, fulfilling all Municipal requirements, &c., &c.

The two thousand lots of ground, and upwards, (of thirty feet front each lot,) (which I estimate there is still remaining unsold by me, belonging to this estate, and which there will be and will remain the property of this estate at my death, as I do not intend to sell or dispose of any more of them,) within the present limits of Macdonogh, (as per my original plan of division,) with many houses, buildings, &c., &c., on them, are very valuable and becoming more so every day:—should be sold out in revertible leases of twenty-five years—say 100 or 200 lots, (of thirty feet front,) every two or three years, as wanted for building on, under certain conditions. Some of the squares laying in the rear of said town, might be leased by the square for the purpose of gardening, &c., &c. The trees standing on most of those squares are valuable, and should be sold for cord wood.

The land in the rear of Macdonogh and adjoining it, bounded by the side line of land belonging to John S. David above, and Toussaint Mossy below, and F. Verret in the rear, containing between three and four hundred superficial or square acres, will have to be, in a few years, (when the demand for more lots shall arise,) laid off by the surveyor into squares and lots of ground, by the continuation of the streets of Macdonogh, which run from the river towards the rear, further back, through said land, and laying off other new streets, running parallel with, or up and down the river to intersect and cross those which will run back from the river, and a plan made of it. This body of land is sufficiently extensive to form out of it between two and three thousand lots of thirty feet in front, each lot, and will be in time of great value. In the mean time, (until laid out into squares and lots) it might be leased in small parcels or tracts by the year, or for four or five years at a time, to be cultivated in garden for the supply of the City with vegetables. I am cultivating at this moment, a part of it, in a very valuable garden. The greater part of it is covered with wood, which is valuable, and should be sold, to be taken off.

The small tract of land, laying at the upper end of Macdonogh, having a front of one hundred and fifty eight feet, French measure, on the river Mississippi, adjoining land of J. S. David above, running back about forty acres, more or less, until it intersects in the rear the line of the land of F. Verret, and fronting in its whole depth, on the lower side, Hamilton street, in Macdonogh, is very valuable, and should be laid out into lots fronting on said Hamilton street, (thirty feet front each lot,) with depths, running across the tract, 158 feet deep, by which means 200 to 300 lots can be made out of it. There is a large convenient house, and other improvements on it. In time, when the neighbor above shall lay out his land into lots, it will be much to his interest to obtain the privilege to communicate his streets, across this tract of land, with the streets of Macdonogh, which he might be permitted to do on giving other lots of ground of an equal number of square feet, (well situated,) in the suburb he will lay off, to the General Estate, to indemnify it for the loss of ground it would sustain by the opening of the streets.

The four thousand (4,000) acres of land and upwards, (being in the rear of what is called the Caselar Estate,) laying forty arpens in the rear, on from the river Mississippi, (except twenty feet in front which lays fronting on the Mississippi, and runs back forty arpens to the rear land,) and running back on in the rear to the Bayou Villars, on River Ouacha, purchased by me on the 28th March, 1837, of Emile Sainet, before Felix De Armas, Notary Public, as also

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two other tracts adjoining said tract below, fronting on said Bayou Villars, purchased by me, say, one of them on the 9th June, 1837, the other on the 1st July, 1837, of Sosthene Roman, Syndic of the creditors of John B. Degray, before F. Seghers, Notary Public, containing (the two tracts) about eleven hundred acres, making, in the three tracts, upwards of five thousand acres of land, must become in time of immense value; (though it may be fifty or one hundred years first or before it will be wanted.) It lays within *one mile* on a straight line of Macdonogh. The plan, or determination, which I had formed in my mind in relation to this valuable body of land, in connection with the town of Macdonogh, is this: The land laying in between Macdonogh and those five thousand acres of land, belong to or are owned by two persons, say, Furcy Verret, and the heirs or children of Prosper Marigny. I had therefore determined whenever those two tracts were brought into the market for sale, (as it must and will be, no doubt, before long, as one body, that of Mr. Verret, is a partnership concern owned by different persons in undivided interests; the other body belongs to minors, the children of the late Prosper Marigny, to whom it cannot be worth a dollar for use, (as it is low ground, and they own only the low land prairie and swamp, after forty arpens from the river,) and who no doubt will be very desirous to sell it when arrived at the age of majority,) to purchase them. By which means, the whole body, together with Macdonogh, (which is the point or outlet on the river Mississippi,) and the land laying in the rear touching Macdonogh, now owned by me, would form a body of land of ten thousand acres, laying opposite and in front of the City of New Orleans. Which property, alone and itself, would become, in time, a mine of wealth, such as no individual would possess in the United States. In the event of my acquiring those two intervening bodies of land, which separate now Macdonogh from my five thousand acre tract, my further plan is, to extend the streets, walks and avenues of McDonogh, on (by degrees as wanted) through the whole body, as it will all in time be wanted for the immense population which is to inhabit New Orleans. In furtherance then of this plan, and the interest of the General Estate, I recommend to the Executors named in my last Will and Testament, (should I not succeed in making those purchases myself personally before my decease,) to purchase, if possible, the whole of the tract belonging to Mr. Verret, from the bank of the river Mississippi back to the bayou Villars on Ouacha, and that of the minors Marigny as now owned by them, say, the rear of their late father's tract from a point distant forty arpens from the river Mississippi back to said bayou Villars. (As it is only that part which is owned by them, the whole of the front on the Mississippi, forty arpens in depth, having been sold out by their late father, previous to his death.) To effect which purchases they could sell the bonds, (or such a part thereof as would be necessary and wanting,) of the First Municipality of the City of New Orleans, left by me, a part of my Estate, and pay the purchase money with the proceeds. To effect the purchase, however, this request and their intentions in relation to it should be kept secret, as success in all transactions of business, must in a great measure depend on secrecy. The wood standing on this five thousand acres of land is very valuable, and must become more and more so every day, not only from the increase of value of the article, but its increase from its yearly growth.

The one hundred and ninety squares, or parts of squares of ground, containing three thousand, six hundred and ninety three lots, (3,693 lots,) laying in the Suburb Washington, in the Third Municipality of the City of New Orleans, purchased by me on the 5th and 26th of April, 1839, of L. B. Macarty and Madame L. Lalaurie, will become in time of immense value, but I estimate that fifty to one hundred years, or more, must pass away before that will take place; (except, indeed, that means shall be sooner taken to drain and improve the ground, when thirty or forty years, in that event, might bring them into use and occasion a demand for them.) But that those lots of ground must become in time of great value, nothing is more certain. From various causes, say, from the washing of the ground in front towards the river, by the rains, carrying earth into the rear, and the natural decomposition of vegetable substances on them, the surface of the ground is becoming every year higher and higher. When a demand will arise for those lots of ground, 200 or 300 of them should be brought into market, and leased out every two or three years. The wood on this land, (Cypress and other timber,) is valuable, and may be sold at public

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auction, to be cut down and removed from off the land by a certain day, so that another crop may push and grow up, as it is a fact that the lands of this country, the low lands of the Mississippi, produce trees of large size, in fifteen years from the root of the old tree, which had been cut down.

The land laying in the rear of the Suburb Livaudais, adjoining the Second Municipality of the City of New Orleans, bounded by Saint George Street, (the last and furthest street in the rear of said suburb,) and thence running back; (See my notes on said property in my list of property owned by me in book,) containing about five hundred (500) square acres, purchased by me on the 10th of February, 1836, from Mathew Morgan, J. S. Peters, L. Pierce and Wm. H. Chase, as per deed before Felix Grima, Notary Public; must and will become in time of immense value, but it may be fifty or one hundred years first. This body of land should be laid off into farm lots, and a plan made of it, under the name of New Suburb Livaudais. The streets of Suburb Livaudais leading from the River bank should be extended through it, and intersected by other cross streets, forming it into squares. And when a demand shall arise for the lots for building on, which will take place in time, two or three hundred of them should be brought into market, and leased out every two or three years. I estimate that there is a sufficiency of land (after deducting for streets) in this tract to form at least four thousand lots, of thirty feet in front each lot. (And it may be, if my title is decided under my purchase, to extend beyond the eighty arpens, from the River in the rear, that then there will be land enough to form six thousand lots.) The wood on this land (cypress and other timber) is valuable, and should be sold to be taken off, and removed by a certain time, under the condition that everything not removed by a certain day, should be forfeited and revert of right, back to the vendor. It is a fact known to the old inhabitants of the State, (whatever the cause or causes may be) that all the swamps, low lands and prairies, both on and off the River, (even 50 or 100 miles off the River) is yearly raising and becoming higher. Prairies, which fifty years since were what is called "Shaking and Trembling Prairies," and were generally covered with one or two feet of water, are now high, dry, and in a great many instances cultivated in sugar cane, cotton, &c.

The forty-one or forty-two squares or parts of squares of lots of ground, containing about nine hundred (900) lots, laying in the Suburb Washington, in the Third Municipality of the City of New Orleans, purchased by me at public auction, as per deed of sale, of the syndic of L. C. Pascal, on the 26th September, 1838, before Joseph Cuvillier, Notary Public, (with the exception of three squares purchased of the syndic of Rousseau, February 13th, 1839, and of the Sheriff, syndic of Aubert;) will become in time of great value, but fifty or one hundred years must probably first pass away, before they will be wanted for the uses of the City. When a demand for them shall arise, they should be brought into market and sold out on lease by degrees, to meet it. The wood on them, (cypress and other timber) is valuable, and can be sold every fifteen and twenty years, as a new growth of timber immediately springs up, as the old one is cut down.

The four thousand four hundred and ninety-eight acres and 20-100ths of an acre of land, (4,498 20-100ths) laying in the rear of the Suburb Washington, and adjoining to it, in the Third Municipality of the City of New Orleans, in township number 12, of range number 12, East, on the East side of the Mississippi River: for which body of land I hold seventy-five certificates of the Receiver of Public Money of the United States, (and must receive *patents* from the General Land Office of the U. States, it having been sold as public land by the Government of the U. States, so soon as said *patents* can be issued.) All which said certificates are in my own name with the exception of twenty-five of them, which are in the name of Mr. Charles Derbigny, but transferred to me, having purchased them of him, "see his deed of sale to me for the quantity of land said certificates call for," executed before L. T. Caire, Notary Public;—must and will become in time of immense value, as it is a property of great extent of surface. So great, indeed, must its value in time be, (say in one or two hundred years,) that no man of the present day, I am convinced, can estimate it. Every foot of it will be wanted in time by the population of the City of New Orleans for building lots, as it lays within two, three or four miles of the centre of the City. When the time shall arrive that the lots will be wanted, (I estimate that this body of land will form at least forty thousand lots, (40,000 lots,)

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each lot fronting thirty feet on a street, and having one hundred and twenty feet in depth, exclusive of the streets which I allow for in my estimate,) it should then be laid out under a general plan by an able and correct engineer and draftsman, the streets made to correspond with those of the City of New Orleans, and brought into market by degrees, by leasing out every few years a certain proportion of said lots. In the meantime said land will be filling up, raising and becoming every year higher and dryer. The wood standing on it may be sold every fifteen years, (as much of it is wooded, and much more prairie, but which will be wooded in time,) divided in ten pieces of ten acres each, and the wood standing on said ten acre pieces sold and taken away, ready for a new growth. And other parts of it may be leased in small farms and cultivated for the supply of the New Orleans market with vegetables, until the time shall arrive when it will be wanted for town lots.

I have already in those memoranda said something on the subject of my large land titles, comprising (the proportion of them owned by me) nearly two hundred thousand arpens, (200,000 arpens) laying in the State of Louisiana, (in what is called the Florida District,) which are as yet unconfirmed by the Government of the United States. As it is probable, however, in the settlement of those claims, that the General Government, (in accordance with the Bill which passed the Senate of the United States, at three different Sessions of Congress,) will insist that the claimants shall take other lands (acre for acre) laying within the State of Louisiana, for those they claim, (seeing that the General Government have either sold or confirmed by law, to the settlers who are settled on them, the greater part of the lands, for which the titles of the claimants call.) In that case, lands of great value, or lands which in time (and that time not very distant) will become of great value, may be secured to the general estate; for those claims of mine, if the proper care and attention is given to the subject of their location, by the Commissioners and Agents of the general estate. The most valuable lands in the world may be taken on both sides of the Mississippi River, laying on and fronting the River, below the Fort of Plaquemine, (which have already been offered for sale by the General Government, but were not sold,) at this present time not very valuable, but from the annual overflow of the River and other causes, will in a few years become of immense value. The same may be said of the lands on both sides of the Bayou Lafourche, low down on it.—The lands in the Parish of Iberville, in the rear of and adjoining those I already possess there, laying about five leagues above the Bayou Lafourche, on the Mississippi, a league or two in the rear of the River, and from thence back to, and laying to, and laying on the Atchafalaya River, are also very valuable; and much land may be taken on both sides of the River Mississippi, in the Parish of Plaquemine, commencing five or six leagues below the City of New Orleans, and from thence running down six or eight leagues further, laying and beginning in the rear of the River, forty arpens from its bank, (called the second depths or conceptions,) which in time will be very valuable. In the rear of Terre du Bœuf, below the City of New Orleans, there is a valuable body of land, as there is also in various places and situations in the rear and off the River, on the western side of the Mississippi and the Bayous which lay in the neighborhood and communicate with the Bayou Lafourche low down, say the Cazaus, Grand and Petite Bayou Black, Bayou Grand, &c. &c. The General Government will, I hope, so shape the law, as to permit the whole of the claims to be laid over again on other land, as it would be the height of injustice for her to insist on our keeping in the Florida District, such parts of the claims as were not taken from us by the settlers, or sold by her, the General Government, which of course can only be the part of the land the least valuable; as it is a natural thing to suppose that the parts of our land taken up by the settlers, and those parts of it which have been sold by the General Government, must be the choice parts of our claims. However, (as the case may be) whatever land may be obtained or remain to the general estate under those claims, should be laid off into small tracts on or off Rivers or Bayous, and leased out to small planters or farmers, for use and cultivation.

The seventy or eighty thousand acres of land laying in the rear of the River Mississippi, on the East side, sixteen leagues above the City of New Orleans, back of the sugar estates of Madame Fontin, and Rezin D. Shepherd, and the plantations of Henry Fonteneau, (for a description of which and my opinion of it, I refer to a list of my property in my account book or ledger, pages fo. 21,

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22 and 24.) A part of it lays within forty arpens from the River Mississippi, the residue eighty arpens from the River, and extends from thence (as per plan) to Lake Maurepas and the Amite River, a depth of eighteen or nineteen miles. This body of land is now at the present time of great value, and in time will become of immense value. Its soil is amongst the richest that the sun shines on, and every inch of it will be cultivated in time, as very small levees would keep out the back waters, and make every part of it cultivable. It must become in time a perfect garden. The timber on it alone (which is of every kind,) is a fortune. Cypress stands on it in sufficient quantities (and of immense growth) to supply twenty steam saw mills for twenty years. This body of land is intersected by several large streams or rivers, (the Arcadian Bayou or New River is one which runs through the centre of the whole tract, and approaches near to the Mississippi, falling into Lake Maurepas,) which are navigable for brigs and schooners of large size. If capitalists from New England would come out, with their industry and perseverance, and put up saw mills on this tract of land, paying certain prices to the general estate for each square foot of timber cut and sawed up, they would (at the price at which our sawed cypress lumber sells at here,) soon make fortunes. The whole tract should be accurately surveyed, a general plan made of it, and the whole divided off into small tracts, and in time leased out to small farmers, for use and cultivation.

The four thousand five hundred and ninety-six acres and 6-100ths of an acre (4,596 6-100ths acres) of land, laying sixteen leagues above the City of New Orleans, on the East side of the River Mississippi, and adjoining the last above mentioned body of land, (of 70 or 60,000 acres,) above or on its upper side, is situate in township No. 11, of range No. 5, East, on the East side of the Mississippi River, and lays, some part of it, forty arpens from the River, adjoining Mr. Shepherd's sugar plantation, and other parts of it at eighty arpens from the River, are held by me in virtue of thirty-nine certificates of the Receiver of Public Moneys of the United States, (being lands purchased by me at the Government sale, for which *patents* must issue to me from the General Land Office;) and is not surpassed in quality by any land in the State. It is of great value; every foot of it is believed to be cultivable; and is heavily timbered with the most valuable kinds of wood. A general plan should be made of it, and the whole laid out immediately in small tracts of fifty acres each, and leased out to small farmers.

The six or seven thousand arpens of lands, more or less, (being seven tracts which were purchased by me from seven different persons,) laying all in one body on the Bayou Des Familles and Bayou Villars, on River Ouacha, within four leagues by land, along a fine road, of the City of New Orleans, (a very easy 1½ or 2 hours ride,) is of great value. There is nothing superior to it in quality in Louisiana, and nearly every foot of it is cultivable. It is sufficiently extensive to form four large sugar estates, is heavily wooded with timber of every kind, and sufficiently near to the City to supply its market with vegetables of every kind for its daily use. Though its value is great now, (for it cost me a large sum of money,) it must become immensely more valuable in time. It lays nearly opposite the lands belonging to me on the opposite side of the Bayou Villars, on Ouacha, in the rear of Macdonough, from which town was there a railroad, (which there will be ere long) the distance would be on a straight line but little over three miles. My intentions are, if spared and permitted so to do, to establish this body of valuable land in sugar estates, and put black people on them to cultivate and work them. If that is not done, they should be divided into small farms, fronting on the different Bayous, say an acre front by a certain depth, and then farms in the rear of those. A general plan made of the whole body, and leased out.

The four different tracts of land laying on and fronting the right bank of the River Mississippi, at about twenty leagues below the City of New Orleans, and which contain, say, one of said tracts eighty or eighty-four arpens in front on the River; another eight arpens in front; another forty arpens in front; and the other ten arpens in front; making in all about one hundred and forty arpens in front on the River bank, all of them by forty arpens in depth. All of which tracts of land lay adjoining each other, and in one solid body; are of great value, and would make three large sugar estates. It is the finest body of land in that region of country, and possesses a noble body of timber. (The timber alone, from its situation, is worth much money.) If I am spared and permitted,

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I intend to establish those lands in sugar. If that is not done, it should be laid out in small farms of one or two acres in front on the River, by forty acres deep, and leased out.

A short distance above the last mentioned tracts of land fronting on the River Mississippi, I own two other tracts of most valuable land, (the most valuable in that District,) containing together, the two tracts, (though they do not lay together, there being a small tract between them,) four hundred and thirty-eight acres and 26-100ths of an acre, (438 26-100ths acres.) One of said tracts has, I think, a front on the River of about thirty acres; the other, I think, a front of eight or nine acres. See township plot. Said land was purchased by me at a sale made by the Government of the United States, and for which I hold two certificates of the Receiver of Public Moneys of the United States, and must receive Government *patents* for it. It lays in the township number 19, in the range number 28, East, on the West side of the Mississippi River. It should also be leased out in small farms.

The thirty-one thousand eight hundred and sixteen arpens (31,816 arpens) of land, (forming a part of what is known as the Vacherie Dugué,) laying at forty arpens in the rear of the left bank of the Bayou Lafourche, in the Parish of Lafourche Interior; fronts in its whole extent on the Bayou Des Allemans, and the Petite Lake des Allemans, as per plan; 'for which see a copy in my Book of Plans.) Said body of land lays at about fifteen or eighteen leagues of the City of New Orleans, by the route of the Barataria Canal, and the Lakes in rear, and must become in time of very great value, from its situation and proximity to the City of New Orleans and the Sea, and the richness of the soil. A considerable part of it is heavily timbered, which, the timber, is spreading and extending yearly more and more. A part of this land is now high, and fit to cultivate the sugar cane on, and all of it would make fine rice plantations. It should be laid out in the course of a few years, (as soon as a demand shall arise for it,) into small tracts of forty or fifty square acres each, and leased to small farmers.

The three thousand three hundred or two hundred (3,200 arpens) square arpens of land laying in the Parish of Iberville, on the right side of the River Mississippi, thirty leagues above the City of New Orleans, and about three miles in the rear of the River, being a part of the estate of the late Pierre Belly, is among the finest and most valuable lands in the world; none can exceed them in richness and fertility, and every foot of it is high and cultivable, covered with timber of every description, and immense cane brakes. The cypress timber on it alone, (the high land cypress, which are of immense growth and size, and as thick as trees can stand on the ground, is worth a fortune. I have been frequently applied to by persons who wished to establish steam saw mills thereon, to sell them cypress, and permit them to establish mills on this land, but always refused; not having time to go and attend to it myself, and without that I might have had my timber destroyed without receiving payment for the one-twentieth part what would be taken and sawed up. But a plan may be fallen on and adopted by calculating the square feet of timber in each tree, and its consequent value, and then ascertaining how many trees stand on an acre of land; the value of the cypress timber on each acre of land would be known with precision; by which means sales could be made of the cypress timber standing on ten acres of land, on twenty, thirty or fifty acres, which should then be surveyed, and accurately marked and bounded, and the purchaser of the timber obligated by contract to have the cypress cut and taken away by a certain time, (say in one year, two years, or a longer time as might be,) under a forfeiture of whatever might remain uncut and unremoved by said day, to the vendor of it.—Some plan of this nature should be adopted, and the cypress sold. If it can be preserved, however, from depredators on it, it will become more and more valuable every year. As soon as the cypress is sold and taken off the land, (there should be however, on further reflection, a certain number of large cypress trees reserved from sale on each small farm, into which said tract will be divided for the uses, (buildings, fences, &c. &c.) of those who will establish and settle said small farms.) The land should be divided off into small farms of 50 or 100 square acres each, and leased out. I have reserved a road, (a private road of my own through the front estate, when I sold off the front estate, back to those lands from the river. A general plan should be made of the whole of this body of land, shewing the subdivisions of it into small farms, the roads through it, and everything else in relation to it.

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Adjoining to those last mentioned lands in the Parish of Iberville, (or close by them) I also own two thousand one hundred and eighty-eight and 70-100ths (2,188 70-100ths acres) square acres of the finest land in the world, (of same quality as that last mentioned above,) laying in the township number 11, of the range number 13, purchased by me at the sale of public land made by the Government of the United States, and for which I hold fifteen certificates of the Receiver of Public Money of the United States, and must receive Government *patents* for them, as soon as issued from the General Land Office. It is also covered with the high land cypress, and should be managed as I recommend for the last tract above, and leased out. A general plan with the tract last above, should be made, shewing their relative position, &c. &c. The 5,400 or 5,500 acres of land in this and the last above described tract, I again observe, are of great and immense value.

The high and extensive body of land called the "Grand Cheniere," lays at about thirteen leagues below the City of New Orleans, on the right side of the River Mississippi, and about two or two and a half miles in the rear of the River. It lays on each side of a Bayou of that name, (which Bayou commences at Lake Hermitage,) fronting on Lake Hermitage on each side of said Bayou, and runs with said Bayou twenty-four miles and upwards, toward the Sea, and to the Sea, having a depth of six arpens on each side of said Bayou. It is a noble, rich and most valuable body of land, and should be laid off into small farms of four or five acres front on the Bayou, with its depth, and leased out. There is a large quantity of valuable live oak timber on it, besides timber of every other description. It is one of the richest soils in the State, and there is now several persons living on it, to whom I have given short leases of small tracts, for the purpose of having the timber (live oak) taken care of, and not depredated on. A general plan should be made of it.

The Island laying on and formed by the Grand Lake Barataria; the little or small Lake Barataria; and the two Bayous or Rivers, called, one of them Bayou Saint Dennis, the other Bayou Cabbanaze, or Grand Bayou, which Bayous run out of Little Lake Barataria into Big Lake Barataria, lays in the Parish of Jefferson, at a distance of eighteen leagues from the City of New Orleans, and is believed to contain fifty or sixty thousand square acres of land, or more.—Some small part of it is high land; there is a considerable quantity of live oak and other timber on it, and it is fast becoming timbered. The whole of it, (being a soil of the richest kind,) is believed to be highly adapted to the culture of rice, as by means of small levees, the rice plantations could be overflowed with water at pleasure. It will in time no doubt become very valuable.

The tract of land adjoining and laying on the lower side of the town of Baton Rouge, (forty leagues above the City of New Orleans,) having a front on the River Mississippi of fourteen arpents, is an immensely valuable body of land.—Its position and situation is most beautiful and advantageous, and it possesses one of the richest soils, covered with the finest timber. It will in time (and that time not far distant) become a part of the town of Baton Rouge, and be wanted for town lots; when a plan will have to be made of it, dividing it into squares and lots, by means of streets, to be leased out. In the meantime it should be laid out into small farms of one acre each, fronting the River, by 20 or 30 acres deep, or running back to a road which crosses it in the rear at about that distance from the River; and then other small farms, fronting on said road in the rear, and running back to the back or rear limit of the tract.

The two thousand and sixty-five acres and 45-100ths of an acre (2,065 45-100ths acres) of land, laying on the River Au Chene, in township number 15, in range No. 12 East, on the East side of the Mississippi River, was purchased by me at a sale of public land made by the Government of the United States, for which I hold six certificates of the Receiver of Public Money of the U. States, and have to receive Government *patents* for it, as soon as issued by the General Land Commissioner,—is of great value. The Au Chene which lays about 1½ miles in the rear of the River Mississippi, heads about five leagues below the City of New Orleans, on the left side of the Mississippi, near to Terre au Bœuf, and runs down towards the Sea, keeping about the same distance in its whole course from the River Mississippi. This body of land begins about six leagues from the City of New Orleans, and has a front of about three miles on each side of said River Au Chene; said River Au Chene running through the centre of it in its whole length. The land is of the first and richest quality, covered with

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timber of every kind, and has on it a large body of most valuable live oak. It should be laid out in small farms of two or three acres, in front on the River, (farms on each side of the River,) with all its depth, and leased out, reserving all the live oak from being touched or cut down; not permitting a live oak tree on any part of the whole tract to be cut down, as that timber is very valuable, and becoming very scarce.

The tract of land of twenty-four acres in front and forty acres deep, laying on the Canal of the Bayou Lafourche, which leads to the Attakapas, is very valuable. The front on the Canal for a few acres in depth, I am told, is low, but after that there is one of the finest and richest bodies of high land in the world. It should be laid off in small farms of one or two acres in front on the Canal, by forty deep, and leased out. It is heavily timbered, and is an almost impenetrable canebrake.

The eleven hundred and fifty-nine acres 90-100ths of an acre (1,159 90-100ths) of land, laying in the townships numbers 18 and 14, in the range number 14, was purchased by me at a sale of public land made by the Government of the United States, for which I hold fourteen certificates of the Receiver of Public Money of the U. States, and have to receive Government *patents* for it. It is a most valuable body of land, none richer or superior to it. It is covered with an immense growth of timber, is an impenetrable canebrake, and lays, I believe, adjoining to the last above mentioned tract, or at any rate in its immediate vicinity. Should be laid out in small farms of 50 or 100 acres each, and leased out.

The tract of land, containing ten acres in front on the River Mississippi, and eighty acres in depth, situate eleven leagues below the City of New Orleans, on the right bank of the River, adjoining the sugar estate of Mr. Andrew Dunford, is a most valuable tract of the best land of the country. It should be divided off into small farms, of one arpent in front on the River, by a certain depth; and then farms laid off in the rear from a high ridge of land which lays there, also of one arpent in front on a road along said ridge of high land, by the residue of the depth of the tract, and leased out.

The tract of land containing six hundred and forty-acres, (640 acres) laying on the left bank of the Amite River, near Lake Maurepas, being the first bluff or tract of high land on the River in going up it, (on which I formerly had a steam saw mill,) is a very valuable body of land, in every light in which it can be viewed, as to soil, (being of the first quality,) elevation, situation, &c. &c. It must be the landing and place of deposit for the shipment of the produce of a large extent of back country, and in time will be wanted (a part of it at least) for town lots, when it should be divided and laid off into squares, lots and streets for a village. In the meantime it should be divided into small tracts for farms, and leased out.

The tract of land containing three thousand two hundred arpens, (3,200 arpens,) laying in the Parish of Opelousas, fronting forty arpens on each side of the Bayou "Ney Pegué," and forty arpens in depth on each side; it is well timbered, and of middling quality. It should be laid out into small farms of one or two arpens in front on the Bayou, by forty arpens deep, and leased out.

For many other valuable tracts of land and other pieces of property, laying in the City of New Orleans, its different suburbs, and the country around, on which I have no particular remarks to make, or information to communicate to the gentlemen, who will see carried into execution my last Will and Testament, or to those gentlemen who will receive the appointments of Commissioners and Agents to the general estate, I refer them to a list of my real estate kept in my book of accounts. Said book is marked or labelled out side, "Ledger," "J. McDonogh."

I recommend to the Commissioners and Agents of the general estate, to have plans made out by their Secretary, and copied into the book kept for the purpose, showing the division into lots, of each particular piece or portion of a piece of property, which shall be divided: its measurements, &c. &c. with a general plan or plans, showing the particular situation of each piece of property, in relation to that which surrounds it, or which is in its neighborhood. As also lists of every piece of property or real estate either in the country, in the cities, towns or villages, belonging to and owned by the general estate; its measurements, place, situation, how disposed of, whether leased or not, to whom leased or rented, for what length of time leased, conditions on which leased, &c. &c. Besides opening

an account on the books of the General Estate for every person with whom it has affairs of business.

As my object in recommending to those Gentlemen who will have the execution of my last Will and Testament, and the Gentlemen who will be named Commissioners and Agents of the General Estate, to take up lands low down on the river Mississippi, on the bayou Lafourche, and various swamp and lowlands in other parts of the State; if misunderstood by them may occasion their surprise, I will observe that the great object I have in view, (as may plainly be seen,) is the gradual augmentation in value of the Real Estate, which will belong to and be owned by the General Estate for centuries to come—by investing at this time small sums of money in large and extensive properties, now at this moment of little value, but which Time, (who is unceasingly at work, and whilst men sleep is actively employed,) will make of immense value. (For Time is never for an instant idle, but is constantly and for ever employed, setting unto man therein a speaking example which says: "Labor, oh man! is the honor of thy being! Labor, and fulfill the intent of thy creation!") So that the revenue arising therefrom, (which alone is to be taken and expended,) will go on increasing with the increase of the country and its population for centuries to come, and produce means in time, sufficient to educate yearly, thousands upon thousands of the poor of our country, which God will, I pray in his infinite mercy and goodness, grant.

It will be well to say here in whom I place my hopes, trust, belief, and faith, and in the tenets of what church of Christ I have walked. My hopes, trust, belief and faith, is in salvation through the perfect, the all sufficient and accepted atonement of our blessed lord and master, Jesus Christ. And I have walked a Presbyterian of the "Presbyterian Church," so called, or that church the ecclesiastical government of which is conducted and ruled by Presbyters.

I request that a copy of these memoranda, recommendations, &c., may be made out and forwarded to the Commissioners of the Free Schools and Free Schools Fund in the city of Baltimore, in the State of Maryland, to be by them copied into a book in their office for safe keeping, as also a copy of my last Will and Testament, also to be copied by them into a book.

[Signed] JOHN McDONOGH.

The slaves mentioned in my last Will and Testament, to be sent to Africa, are already sent and gone there.

The slaves James Thornton, Noel, John Defage and Long Mary, (being old and faithful servants,) are to be set free here.

I recommend that Insurance on some of the buildings, laying in New Orleans and Macdonogh, be effected in other cities of the United States, (or Europe,) besides New Orleans; because if the whole city of New Orleans should be burned down, the Insurance offices would be ruined and rendered unable to pay the loss.

I request that a copy of my will, a copy of these notes and memoranda, with a copy of the inventory of my Estate, may be forwarded to the Governor of the State of Maryland, to be placed in the Archives of that State, for the purpose of knowing its rights under my Will through all future time. So that, if it should be attempted hereafter to violate my Will and intentions in any way, that she (the State of Maryland) may know and put it right, or other ways seek her just interest under it. And that the same may be done (for the same purpose and intent) and delivered to the Governor of the State of Louisiana, to be placed in the Archives of this State.

Should I be cultivating any estates at my death, on which I have slaves, I recommend to the Commissioners and Agents of the General Estate, to purchase other slaves, (every fifteen years as they are authorized to do by my Will,) to cultivate said estates, (whether profitable or not, as by so doing said slaves will obtain their freedom in Africa fifteen years; which circumstance with the spread of the Gospel and civilization consequent thereon, will be a good far exceeding all pecuniary profits and advantages of this world,)—and replace those who will have served fifteen years, and have been sent to Africa, and so on every fifteen years, (so long as there shall be slaves remaining in our country,) purchasing a sufficient number for the cultivation of the estates, and delivering up to the Colonization Society all such slaves as have served fifteen years to be sent to Africa.

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I recommend that great care be taken in selecting proper men as overseers and managers for the estates—that they are pious and christian men, who will strive to lead the black people to the Most High, at the same time that they make them and teach them to do good work, to be faithful, industrious and indefatigable in their labors.

That application be made to the Legislature of the State for permission to educate the black people on the different estates, (a good English education,) as they are to be sent to Africa.

If permitted by law, get teachers and have them educated, and specially in the knowledge of God.

See that the overseers, every morning and evening, assemble the people in prayer before going to work in the morning, and after work at night.

See that the overseers have them taught, old and young, (little children and all,) the Ten Commandments, the Lord's prayer, and the Creed, and (if permitted by law,) hold Sunday Schools.

As soon as they know how to read, give each one a copy of the Holy Bible.

And on going to Africa, see that a copy of that holy book, (the Bible,) is put into the hands of each, to be taken with them.

If permitted by law, let Sunday Schools be constantly held for the whole of them, old and young, and they made to attend it the whole day.

Let there be a house erected on each plantation for a Church, and divine service performed therein on the Sabbath day, forenoon and afternoon constantly.

On such estates as I may be cultivating at my death, and which the Agents and Commissioners of the General Estate may continue to cultivate after my decease, the slaves and cattle, (immaterial what the culture carried on may be, sugar or other,) shall not be permitted to labor on the Sabbath day, but shall cease work at sundown on Saturday evening and commence again their labor at sundown on Sabbath evening.

I recommend that the estate laying in the Bayou St. John and the Metarie Road, be laid off into acre lots, fronting the Metarie Road, running across said tract of land, (eighteen acres deep,) and leased out for gardens. And in time, (when the lots will be wanted for city lots,) that a plan be made of it, dividing it into squares and lots, as the streets of the city of New Orleans, continued back will run through it, and then it may be leased out in small city lots. The revenue arising from this body of land will, in time, be very great.

I recommend that the Secretary of the General Estate be made to reside in the house which I now occupy in Macdonogh, by which means the black people, mechanics and others, will be kept out of the contaminating influence of the city of New Orleans, and be the more easily managed. Bricks made, lime burned, and other materials kept in store, and laid up for use.

Having been the friend of the black and colored man through the whole period of my long life, I will now (when near its close) give to them, (the free black and colored man, wherever he may be throughout our widely extended country,) a parting counsel and advice, in the interest of themselves and their posterity. The counsel I offer them, in all the sincerity of my soul, is that they separate themselves from the white man. That they take their wives, their children and their substance and depart to the land of their fathers, that great and ancient land, where they and their posterity, through all their generations, may be safe—may be happy—living under their own fig tree and vine, having none to make them afraid.

If my mind has been virtuously disposed in life, I am indebted for it, under the Most High, to the education bestowed upon me by virtuous and pious parents, (blessed be their memory,) and especially to the care they took in instructing me and having me instructed in music. At a time when there was no other teachers in the city of Baltimore but a singing school for youth, held at night, my beloved father would take his sons and daughters by the hand and lead them there nightly, staying there with them, taking a part in their singing and exercises, and then would lead them home. That love for singing and music, given me in my youth, has been the delight and charm of my existence, throughout all its subsequent periods, notwithstanding from the multitudinous occupations of my life, I have been able to give it but little of my time; still its love and charm pervaded my existence, and gilded my path to comparative happiness here, and as I say above, led me, as I firmly believe (under the Most High) to what little virtue I have practiced.

[Signed]

JOHN McDONOGH.

Johnson, Attorney General, Alfred Hennen, Taylor, and Elmore & King, for the States of Louisiana and Maryland. R. Hunt, Graihle, Preaux, Pierce and Roselius, for the City of New Orleans.

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Counsel for plaintiffs argued in substance as follows :

What estate, or title, is vested in the cities? The restrictions in the Will are inconsistent with ownership. Code, 475, 476, 481, 483. They are forbidden to enjoy the property, and hence are not usufructuaries; and cannot be usufructuaries, because, if they be, the title is not vested anywhere. Code, 525.

The title, under the Will, to the Cities is a naked trusteeship without any beneficiary interest in the Corporations.

The Will provides for the perpetuation of the Estate, or its inalienability, and these are forbidden by public policy. *Henderson v. Rost*, 5 A, 441; *Mathurin v. Litaudais*, 5 N. S, 302; *Ducloslange v. Ross*, 8 A, 482; *Harper v. Stanborough*, 2 A, 381; *Arnaud v. Tarbe*, 4 L. R, 504; *Farrar v. McCutcheon*, 4 N. S, 45; *Cloutier v. Lecompte*, 8 M. R, 485. From motives of public policy substitutions were abolished in France. 5 Toullier, No. 20, p. 18. Same policy in England, 2 Blacks. Com. 174. The law abhors perpetuities, 4 Ibid. 108, 2 Ibid. 268 et seq.; 4 Kent, 181.

The "accumulations," contemplated by the Will, are against public policy. They would, in a comparatively limited time, absorb the whole personal and real estate of the world.

The bequest to the Cities of New Orleans and Baltimore is null, because it is a substitution and a *fidei commissum*, prohibited by law. Code, 1507; *Ducloslange v. Ross*, 3 A. 483; *Arnaud v. Tarbe*, 4 L. R, 506; Toullier, No. 37.

The illegal conditions cannot be regarded as not written.

Toullier, in speaking of the circumstances under which the prohibition to alienate may be regarded as not written, lays down the following rules :

"Au reste, nous n'ajouterons rien à ce que nous avons dit dans le même volume, p. 253 et suiv., sur les conditions contraires aux lois ou aux bonnes mœurs. 6 Toullier, No. 487.

"Nous insisterons seulement sur un principe sans lequel les décisions retomberaient nécessairement dans l'arbitraire; c'est qu'il faut un texte positif ou les raisons les plus fortes pour annuler une condition. Si l'on éprouve du doute ou de la difficulté pour expliquer comment et pourquoi telle condition est contraire aux lois ou aux bonnes mœurs, n'est-ce pas un motif pour décider qu'elle ne doit pas être annulée? Prenons, par exemple, la condition de ne point aliéner, insérée dans une disposition de dernière volonté, ou bien dans un contrat à titre gratuit, ou même onéreux. Est-elle contraire aux lois? Nous avons dit, tom. V, p. 70, No. 51, *que c'est une condition nulle et réputée non écrite*; mais cette proposition mérite explication. La condition de ne point aliéner, ou la défense d'aliéner, n'était regardée comme contraire aux lois, ni dans le droit romain, ni dans l'ancien droit français; elle était considérée comme renfermant une substitution tacite lorsqu'il paraissait que la condition de défense était insérée en faveur d'une tierce personne. Voy. Pothier, *Traité des Substitutions*, sec. 2, art. 2, et sect. 3, art. 3, § 1; Ricard, *Traité des Substitutions*, No. 329.

Sous l'empire du Code qui n'admet point de substitutions tacites, la condition de ne point aliéner ne serait pas jugée renfermer une substitution, à moins qu'on n'y eût ajouté la charge de conserver les biens et de les rendre à des personnes désignées. Hors ce cas, la condition ou la défense d'aliéner n'est qu'un conseil ou un précepte non obligatoire. (Leg. 114, § 11, ff. de legat., 1; leg. 38, § 4; leg. 93, de legat., 3,) lorsque la condition est pure et simple, parce que celui qui l'a imposée n'a aucun intérêt à en réclamer l'exécution.

"Mais si la condition ou la défense d'aliéner n'est pas pure et simple, si, par exemple, on y avait ajouté une peine en cas d'infraction, si j'avais stipulé que vous me donniez 600 fr. à moi ou à Titus, si vous aliénez le fonds cornélien que je vous ai donné ou vendu, la peine serait encourue de plein droit, par l'aliénation que vous auriez faite, et cette peine ne pourrait, dans les principes du Code, être modérée par les juges (1152, 1231), Voy. ce que nous disons *infra*, sect. 6, sur les Obligations avec clauses pénales.

"Si j'avais stipulé que la vente ou la donation sera résolue en cas d'aliénation des biens vendus ou donnés, j'aurais le droit de poursuivre la résolution contre les tiers acquéreurs, et de rentrer dans la propriété des biens, et cette résolution, s'opérant *ex causâ primordâ et antiquâ*, anéantirait toutes les hypothèques et charges créées dans le temps intermédiaire, (voyez Vourjon, *Droit*

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commun de la France, tom. II, p. 126, édit. de 1747,) quand le droit de retour milite contre des tiers.

"Mais l'effet de la condition portant que la vente ou la donation sera résolue en cas d'aliénation, faite par le vendeur ou par le donataire, ne passe point à ses héritiers, parce que cette résolution a l'effet d'un droit de retour, qui ne peut, suivant l'art. 951, être stipulé qu'au profit du donateur seul, et par identité de raison, au profit du vendeur seul.

"Ce n'est donc que dans les cas où la condition de ne point aliéner est pure et simple, dans les cas où elle n'a pas pour objet un droit stipulé en ma faveur ou en faveur d'un tiers, qu'elle n'est qu'un conseil, un précepte non obligatoire, qui n'empêche pas que l'aliénation faite au mépris de la condition ne produise son effet et ne transmette la propriété; c'est alors qu'elle est nulle et comme non écrite, soit dans les testaments, soit dans les contrats." 6 Toullier, 488.

Merlin. "La simple prohibition d'aliéner emporte-t-elle fidéicommiss ?

"La loi 114, § 14, D. *de legatis*, 10, et la loi 88, § 4, D. *de legatis*, 80., décident que non, parceque, disent-elle, cette prohibition ne forme qu'un *præcepte* nu qui ne lie point et ne donne action à personne.

"Mais, suivant le § 1 de la seconde des lois citées, et la loi 69, § 8, D. *de legatis*, 20, il y a fidéicommiss quand le testateur a défendu d'aliéner hors de son agnation ou de sa famille, parcequ'alors il y a désignation suffisante de la personne en faveur de qui cette défense a été faite.

"La raison veut sans doute qu'on applique à la défense de tester, les mêmes principes qu'à la prohibition d'aliéner, et conséquemment qu'on n'en fasse résulter de fidéicommiss que dans le cas où il se trouve quelque indication d'une personne substituée.

"Cependant il y a une loi qui semble décider en général que la défense de tester emporte une Substitution fidéicommissaire. C'est la 74e, D. *ad Trebellianum*, 'Un particulier (dit elle) qui avait un fils et une fille, a fait son testament, et s'est ainsi expliqué sur sa fille: *Je vous ordonne de ne point tester, tant que vous n'aurez point d'enfants*. L'empereur a dédié que cette disposition valait fidéicommiss, comme si le défunt, et défendant à sa fille de tester, lui eût enjoint de nommer son frère pour son héritier.'

"Mais, comme le remarquent les meilleurs interprètes, deux circonstances particulières ont motivé cette décision. 1o. La prohibition de tester n'était pas pure et simple: le testateur avait défendu à sa fille de tester *jusqu'à ce qu'elle eût des enfants*; et cela indiquait assez qu'en faisant cette prohibition, il avait eu en vue son fils, frère et co-héritier de sa fille, et avait pensé, à le faire succéder aux biens que celle-ci recevait, en cas qu'elle n'eût pas d'enfants. 2o. Le testateur avait institué son fils et sa fille *conjointement*; du moins on doit le supposer d'après les termes de la loi; ainsi, le fils se trouvait nommé dans le testament même qui contenait la défense de tester." 32 Merlin, Y. Bis. p. 152.

Mode. "Ce mot se prend, en droit, pour une clause qui modifie un acte d'après un événement incertain; et l'on appelle ainsi toute disposition par laquelle un donataire ou testateur charge son donataire ou légataire de faire ou de donner quelque chose en considération de la libéralité dont il le gratifie.

"1. On confond quelquefois le Mode avec la condition; il y a même des textes du droit romain, qui donnent à l'un le nom de l'autre; telles sont la loi 8, § 7, D. *de conditionibus institutionum*; la loi 21, § 3, D. *de annuis legatis*; la loi 71, § 1, D. *de conditionibus et demonstrationibus*; la loi 2, § dernier, et la loi 3, D. *de donationibus*.

"Il y a cependant une différence entre le Mode et la condition, et elle consiste tant dans la manière de les exprimer, que dans les effets qui en résultent respectivement.

"La loi 80, D. *de conditionibus et demonstrationibus*, nous apprend en quoi la formule caractéristique de la condition diffère de celle qui désigne le Mode: *Nec enim, dit elle, parem dicimus eum cui ita datum est, SI monumentum fecerit, c'est la condition; et eum cui datum est UT monumentum faciat, c'est le Mode*. On voit par-là que la particule *si* forme la condition, et que les mots *pour, afin, que, à la charge*, caractérisent le Mode.

"Mais, pour que ces mots forment une disposition vraiment modale, il faut qu'ils ne se rapportent pas uniquement à l'intérêt du donataire ou légataire. Ainsi, dans le legs fait à quelqu'un *pour* étudier, *pour* se mettre en métier, ou *pour* aider à se marier, il n'y a point de Mode, mais seulement une cause impulsive, dont le défaut d'accomplissement n'empêche pas le légataire de recueillir

la libéralité du testateur, à moins que celui-ci n'ait manifesté une intention contraire. La loi 71, D. *de conditionibus, et demonstrationibus*, porte que, 's'il a été légué à Titus cent écus pour s'acheter un fonds de terre, on ne droit pas lui demander caution pour l'exécution de cette clause, parcequ'elle ne concerne que son intérêt.'

"Il en est tout autrement lorsque les particules *pour* ou *afin* que déterminent une disposition qui a pour but, soit l'intérêt d'un tiers, soit quelque autre considération que le testateur a eue en vue, indépendamment du bien-être particulier du légataire; alors, elles forment, ou une cause finale, ou un Mode, ce qui revient au même quant à l'effet.

"Le droit romain nous fournit plusieurs décisions relatives à ce cas. La loi 71, § 1, D. *de conditionibus, et demonstrationibus*, dit que, dans cette espèce, 'je lègue à Titus cent écus, afin ou pour qu'il épouse Mœvia, qui est veuve,' le legs est conditionnel, et que la condition ne doit point être remise; mais c'est proprement un Mode qui opère, à cet égard, le même effet qu'une condition, comme le prouve la loi 1, C. *de his quæ sub Modo legata vel fideicommissa relinquuntur*. On sent que, dans ce cas, il ne s'agit pas d'une simple cause impulsive, ni d'un fait qui ait pour objet le seul intérêt du légataire, mais d'une chose à laquelle le tiers désigné par le testateur est personnellement intéressé; et c'est pourquoi la disposition est considérée comme modale.

"En général, lorsque les mots *pour* ou *afin* que ne renferment qu'un simple précepte, *nudum præceptum*, il n'en résulte ni condition ni Mode. La loi 38, § 4, et la loi 93, D. *de legatis* 80, le décident ainsi clairement; et toutes les fois qu'indépendamment de l'intérêt du légataire, le testateur a eue quelque autre vue, les termes dont il s'agit doivent former une clause modale. V. l'article *Légataire*, § 7, art. 2." 20 Merlin, *verbo* Mode, p. 350.

See also 16 Merlin, p. 510, *verbo* *Légataire*, §7, art. 2, Nos. 13 & 14.

These authorities clearly establish the two following propositions:

1. The prohibition to alienate cannot be regarded as not written when it is enforced by a penalty.

The reason of this is very apparent. Where a donee is required to do a particular thing under penalty of forfeiture of the donation, in case of non-compliance with the donor's wishes, it shows that the donor's intention was not so much to confer a favor upon the donee, as to have the particular thing done. And if the thing were not done by the donee, that he preferred some other object as the recipient of his bounty.

2. Where it is evident, from the will, the testator had in view any other motive than the benefit of the legatee, or the benefit of any other person than the legatee.

The reason of this rule rests upon the fact that in all such cases the donation would necessarily involve a substitution. If so, the whole donation would be void, and could not be rendered legal by trimming off the parts which rendered it a substitution.

4. Dalloz, Dict. Juris. p. 417, sec. p. 275, "En règle générale, toutes les conditions impossibles ou contraires aux lois et aux bonnes mœurs sont réputées non écrites, lorsqu'elles se rencontrent dans une disposition entre-vifs ou testamentaire, et la donation ou le legs reçoivent leur exécution. C. C. 900. *Mais il en est autrement en matière de substitution prohibée.*"

Now let us apply these principles of the law to the facts, as shown by the will.

1. Is there a penalty prescribed?

At p. 30 of the will, the testator says, in substance, he has seen most bequests, such as he had made, perverted from the purposes of the donor; fearing this, and that the property might be alienated, he interested the two States in his property.

How did he interest them? By giving them the property in case the cities did not fully carry out his intentions, a main feature of which was, that the property should never be alienated. We find him, on p. 28, fully providing for this contingency and prescribing the penalty.

"And should the Mayor and Aldermen of the city of Baltimore, in the State of Maryland, and the Mayor and Aldermen of the city of New Orleans, in the State of Louisiana, or their successors in office, combine together, and knowingly and willfully violate any of the conditions hereinbefore and hereinafter directed for the management of the general estate, and the application of the

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revenue arising therefrom; then, in that event, I give and bequeath the rest, residue, remainder and accumulations of my said general estate * * * to the States of Louisiana and Maryland in equal proportions."

Here we find the penalty as distinctly declared as it was possible for the testator to have expressed himself. Then, under the foregoing authorities, the prohibition to alienate cannot be disregarded.

2. Had the testator in view any other motive than the benefit of the cities of New Orleans and Baltimore? He expressly declared he did not intend a dollar of his money to go into the coffers of those corporations. He solemnly enjoins upon them never to divert his property to their own benefit. Then, how, under the foregoing authorities, can the prohibitions to alienate be disregarded?

But further, did the testator intend other persons than the corporations of New Orleans and Baltimore to be benefitted by his bequest?

1. The poor of the town of McDonogh were to be benefitted. Will, p. 8.

2. The poor of New Orleans were to be benefitted. The poor of New Orleans are a very different body from the corporation of New Orleans. Will, p. 8, 24, 80.

3. The four classes of annuitants, very distinct bodies from the corporations of the cities of New Orleans and Baltimore, were also to be benefitted.

Thus we find in this case, not one only, but every condition under which the prohibition to alienate cannot be disregarded. Any one of them would be sufficient for our purpose. The defendants are estopped in their very first attempt to apply the pruning knife to the provisions of the will. The prohibition to alienate is there as a substantive part of the bequest to the cities; and there, whether "for weal or for woe," it must remain. If that prohibition stamps the bequest with nullity, as was conceded in a former trial, if it could not be gotten rid of, then the bequest is null, for it cannot be legally erased. But even if the prohibition to alienate was stricken out of the will in every place in which it occurs, it would not at all help the defendants; it would not render the property subject to alienation, for this plain reason, that there is no one or body in which is vested by the will an assignable interest. The cities, under the most favorable view of their title, are but trustees, and could not sell or dispose of the property in contravention of the trusts confided to them, and every sale would contravene those trusts. They have not in law an assignable interest.

The charitable institutions could not alienate the property, for nothing but the revenues are given to them by the will.

The erasure of the prohibitions to alienate would not increase their respective titles. The inalienability of the property results as directly from the character of the titles created, as it does from the prohibitions contained in the will. We think the attempt to erase the illegal parts of the will, under art. 1506, C. C., is based upon a misinterpretation of that article, or from a wrong impression as to the character of the will.

The article applies only to dispositions which are conditional. It is the *conditions* which are impossible, are contrary to law or morals, that are to be regarded as not written. Now it is very apparent that a disposition to one in trust forever, for the benefit of others, is not a donation to the trustee upon condition. To maintain that it is, implies a misapprehension of the true signification of an estate upon condition. It is an estate, the vesting or divesting of which depends upon the happening of some future event. C. C. 2015, 2016, 1546, 1552, 1553, 1554, 1555. 5 Merlin, p. 352, 343, et seq. *verbo Condition*.

Conditional donations are of two classes; those which depend upon the happening or performing of conditions precedent; and those which depend upon the happening or performance of conditions subsequent. In donations depending upon precedent conditions, the property never vests until the performance of the condition. If the condition be not complied with, there is no translation of the property; there is no donation. In those dependant upon subsequent conditions, the property vests at once, and is subject to be divested upon the non-compliance of the donee with the conditions. In both these cases the property always vests somewhere. The title is never in abeyance. Where the conditions are precedent, it never leaves the donor's estate until the happening of the condition. In conditions subsequent, it returns immediately to the donor's estate upon the non-performance of the condition. C. C. 1546, sec. 2 and 3, 1552, 1553, 1554, 1555. 20 Merlin, p. 358.

But a disposition by which property is to be held in trust forever, for the use of others, is not the donation of an estate to the trustee upon condition that he gives the use to others. It is not a donation at all of the ownership of property to the trustee. On the contrary, the very nature of the estate created by the disposition forbids the possibility of the trustee ever becoming the real owner of the property. Having from the beginning no real interest in the property, whether the use be carried out or not, the ownership or the beneficiary title never vests in him. If the use cannot be executed, the property reverts to the estate of the donor. 2 Story, Eq., p. —. 20 Merlin, p. 853.

The estate of a trustee, then, is not an estate vested upon conditions; nor is a donation in trust a donation depending upon the happening or not of a condition. It is a qualified or peculiar title, which vests, such as it is, at once, and depends upon no condition, precedent or subsequent. This view of the case, we think, also clearly results from a comparison of the two articles, 1506 and 1507, of the Civil Code.

If a substitution or a *fidei commissum* was an estate depending upon a condition, then the two articles would be directly inconsistent. For the latter article annuls all such dispositions, both as to the donee and instituted heir or legatee; while the former would preserve them, by simply cutting off the illegal or impossible condition, leaving a good fee simple title in the donee. This shows most conclusively that the framers of the Code did not regard substitutions, or *fidei commissum*, as donations upon condition, or embraced by the provisions of article 1506.

The estate, created by the bequest to the cities, is both a substitution and a *fidei commissum*. If so, the art. 1506 does not apply to the case, and does not sanction the trimming of a substitution, or *fidei commissum*, to legal dimensions. See also 4 Dalloz, Dict. Jurs. p. 474.

There is some difficulty in applying the civil law, and the writings of the commentators upon that system, literally, to a trust estate. For, as we have already observed, trust estates, literally speaking, are of modern origin, and grew up under the common law. A fiduciary bequest, in the civil law, is defined to be "a disposition by which the executor, or legatee, is entreated to restore, or to give to a third person a certain thing." See translation of Domat, vol. II, p. 501, No. 8496, part 2, book IV, tit. 2, sec. 1, art. II.

The difference between this and a trust estate is readily perceived. In the fiduciary bequest the title to the property passes, accompanied with a charge to transfer it to another person. While in the trust estate the real beneficiary title does not pass to the trustee, and the title he does receive he is charged to retain and not to restore to another.

But even if the cities be regarded as vested with an absolute title, or legacy, upon which the uses are to be considered as merely charges, still the cities would be bound to comply with those charges and could not take the property freed of them. C. C. 1515. "The donor may impose on the donee any charges or conditions he pleases, provided they be not contrary to law or good morals." Now to educate the poor, and to found charitable institutions, are not things contrary to law or good morals. This is not the illegality we have complained of as existing in the Will. Our objection is that the law does not permit property to be held by titles such as substitutions, *fidei commissum*, or other tenures which tie it up out of commerce. With this explanation we say the cities would be bound to comply with the charges, and could not hold the property without doing so. C. C. 1554, 2 Domat, p. 508, Nos. 3501, 8508, also p. 374, No. 3218, et seq; 16 Merlin, *Légataire*, p. 509, sec. 11, 12, 13. The idea of freeing the cities from those charges by means of Art. 1506, C. C. is altogether illusory, and yet it is conceded the bequest of the cities must fall, if this cannot be done.

Supplemental Brief of W. W. King :

In compliance with a request from the Bench during the argument of the cause, I have prepared this supplemental brief to furnish the court with the authorities referred to by me in the course of my oral argument.

Upon the construction of the will: The intention of the testator must be observed. C. C. 1705.

1st. The testator never intended the corporations of the cities of New Orleans and Baltimore to be benefitted by his bequest to them.

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2d. He did not intend that his legal heirs should get his property.

3d. In case his bequest to the cities did not, or could not, take effect, he intended his property should go to the States of Louisiana and Maryland.

4th. That he never intended the cities to take his property unless *all* his directions were to be strictly observed. If the cities did not, or could not, observe his instructions or directions, in that event he desired his property to go to the States.

In support of these positions, the following pages of the printed Will were read and commented upon: pp. 7 and 8; pp. 21, 22 and 23; pp. 28, 29 and 30; pp. 31 and 32.

The construction of the word "*Lapse*." Burrell's Law Dictionary; 1 Jarman on Wills, pp. 302, 303, 587.

Construction of the word "*Caducue*." C. C. 1696, 1478, 1702, 1508.

The word "*Lapse*" was used in the will, p. 28, in the sense of "*not take effect*."

The word *Legacies*, at the bottom of p. 28 of the will, was used in the sense of "*property embraced in the bequest to the cities*."

McDonogh planned a magnificent and fanciful scheme of public charity, which he expected would immortalize his name, and appointed the cities as the supervisors of that scheme.

If his scheme could not be executed, if the cities did not or could not carry out his intentions, then he did not intend to benefit those corporations, or to leave his property subject to their discretion, but intended it should go to the States, vesting in them the discretion of executing his instructions so far and in the manner which might appear to them the most proper.

This position, I think, manifest from an inspection of the bequests on pp. 28 and 29 of the will.

If the bequest to the cities could take effect, and they failed to comply with his instructions, he provided for that contingency, by forfeiting the property to the States, for the education of the poor, (not of the cities only,) but of the States, under a general system of public education.

If the bequest to the cities could not take effect, the testator evidently saw it must be owing to the directions and instructions inseparably coupled with that bequest. In order, then, to prevent his property going to his heirs, and to insure its application to public purposes, he made a second or substituted bequest to the States, relieving them from the prohibitions and instructions annexed to the bequest of the cities.

In this manner he provided for every contingency which could arise, affecting the dispositions made by him of his property.

Now it is not pretended that the cities can, or will, carry out his intentions. It is not pretended that property can be forever kept in a state of inalienability. That the accumulations, directed by him, will be created and preserved. That the property will remain forever undivided. The observance of every one of these directions is requisite to carry out his scheme. If the property be sold his whole plan necessarily falls to the ground. The same may be observed of the division of the property, and a very important part of the will must fail by the destruction of the accumulations contemplated.

The contingency provided for by the testator has occurred. The cities cannot carry out his intentions, and in that event he intended the property to go to the States under the substituted bequest to them. If his wishes and intentions are to be regarded, the property must go to the States. To permit the cities to take the property, under these circumstances, would be a palpable violation of the intention of the testator, and of the Art. 1705 of the Civil Code. An attentive perusal of the will must, I think, satisfy every candid mind of the correctness of the foregoing conclusions; if so, then nothing further is requisite for the decision of this cause than the simple application of the article of the Code above cited, to the evident meaning of the will. This is the first and most important point in the case. If well taken, it is decisive of the cause. Although a great portion of my oral argument was occupied in its discussion, and a considerable portion of the printed briefs, already filed, has been devoted to it, I trust I will be permitted to urge some further considerations on the subject, especially as our attention has been directed to it by the Court. I shall endeavor to express my views in answering the query very properly propounded by the Court. It was, as I understood it, to this effect:

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"Suppose it appears from the will that the inalienability of the property was so far the dominant idea of the testator, that he would not have given his property to the cities unless his instructions and directions, in that respect, were to be observed, but that if his instructions were not to be observed, he desired his property to go to the States, what, in that event, must become of the property?"

As a question of law I do not see how the right of the States to receive the property, under the circumstances proposed, could be doubted. A will is but the expression of the intentions of the testator. The whole object of our laws upon the subject of testaments, is to insure the execution of the intentions of the testator. If those intentions be lawful, the will is itself the law of the case, and the Courts are bound to carry out those intentions. There is nothing in our law which prevents a man from willing a legacy for any purpose whatever, and in the event of that legacy being void, or not taking effect, willing the same property to a substituted legatee. The right to make such a substituted legatee is necessarily implied from the power of making a will. Further it is expressly recognized by Art. C. C. 1508.

The will in itself shows, as clearly as language can express the idea, that McDonough would not have given his property to the cities freed from the prohibition against alienation. That if any of the *conditions directed* for the *management* of his estate, or *the application* of the revenue arising therefrom, were to be violated, in that event he desired his property to go to the States. It is difficult to elucidate or explain language which, in itself, is so unequivocal. Like the clear fountain, the more you disturb it the less transparent it becomes.

The very fact that he substituted the States, instead of the cities, to take in case his previous bequest to the cities did not take effect, shows beyond all question that he was not willing to trust his property to the discretion of the cities, or that they should take it freed from the prohibitions against alienation, &c., imposed by him. It would have been very easy for him, in providing for the contingency of his bequest to the cities not taking effect, to have made a substituted bequest in favor of the cities; to have said, in case my first bequest to the cities cannot take effect, from any cause whatever, then I will my property to the cities, leaving it to them to carry out my intentions "so far, and in the manner which will appear to them the most proper." The fact that he did not do so, but substituted the States to take, in that event, is conclusive proof that his intention was, the cities should not take the property freed from the prohibitions and restrictions embraced in the bequest to them.

How can any one read the will and come to the conclusion that McDonough intended the cities to take the property freed from the prohibition to alienate? We find him repeatedly giving expression to that favorite and dominant idea, the inalienability of his property in their hands. We find him openly expressing his distrust of the cities. Under the apprehension that his wishes and intentions might be disregarded by the strong will of the cities, we find him endeavoring to fence round this favorite idea, with what he supposed would prove effectual barriers. To conclude, after all this, that he intended the cities to take the property freed from the prohibition to alienate, would be an utter perversion of reason and of the plain meaning of the English language. It is conceded, on all sides, that the cities cannot take the property by a tenure or title which will necessarily render the property forever inalienable. That such a title cannot exist under our law. If the cities then take at all, they must take with the power of alienation, in other words, they must take in direct opposition to the intentions, nay, supplications and remonstrances of the testator. To meet this contingency, and to prevent the property going to the legal heirs, the testator made the substituted bequest to the States. The cities cannot take the property without a palpable violation of the intentions of the testator. The States cannot fail to recover it, without an equally clear departure from his wishes.

In the original brief, filed by the counsel for the States, we have endeavored to demonstrate that the prohibition against alienation, in the bequest to the cities, could not be disregarded without a manifest violation of the rules of law. See that brief.

In addition to the authorities therein cited, I invite the especial attention of the Court to the following: 12 Pothier's *Undeeds*, p. 245; Roman Dig, book 33, tit. 2, sec. 17. -

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The last authority is conclusive, not only in regard to the prohibition to alienate, but also as to the other instructions and directions coupled with the bequest. It is, in substance, this: "A citizen left his estate to the Republic, wishing to found certain games (*ludos*) out of the annual revenues; and added: 'quæ legata, peto decuriones et rogo, ne in aliam speciem, aut alios usus, convertere vilitis.' That he forbid his property being used in any other way, or converted to any other use.

"The Republic, for four consecutive years, did not found the games, the question was whether the Republic should pay over to the heirs the annual revenues which had been received, or whether they should discharge the duty imposed by the will in some other way, (*compensare in aliam speciem legati ex codum testamento?*) The answer was that the Republic was bound to restore the revenues, which had been received, to the heirs, and that it was not permitted to inquire what might have been the second wish of the testator, by the doing of which the obligation imposed by the will would be discharged."

This decision was rendered in Rome, where the *cy pres* doctrine of modern times was recognized in its fullest extent, and where substitutions and *fidei commissæ* were not prohibited.

It broadly asserts the principle, that where the testator wills his property for a particular purpose, directing that it shall be used for no other, the legatee is bound to so apply it, or the persons next called to the succession are entitled to take it. In this case, it went to the legal heirs, but if there had been a substituted residuary legatee, as in McDonogh's will, the property would have gone to that substituted legatee.

Let us apply this case to McDonogh's bequest to the cities. He repeats, in a variety of forms, the manner, and the only manner, in which his property shall be managed and used. He forbids, in the most positive terms, any other mode of managing or applying it. In this respect, these two wills are identical. The above decision shows that the cities cannot take the property and manage or use it differently from the manner in which he directed. It is not pretended that the cities can, or will follow his instructions. If they be not able to follow them, it is tantamount to a refusal to follow them, and, under the authority of the above case, the property must go to the States, being next called to the succession. The above reference is preceded by the response of *Modestinus*, sec. 16, which was read to the Court. The Roman law was similar to art. 1506 of our Code. If the article of our Code be so potent, in regarding *McDonogh's* directions as not written, because they are contrary to law, we ask why did not *Modestinus* make that answer when questioned as to the effect of similar instructions forbidden by law? He did not regard them as not written, but enforced them, *cy pres*, which cannot be done under our law.

I have thus, at considerable length, endeavored to express my views, as to the proper construction of *McDonogh's* will. I have done so with a firm conviction that nothing further was necessary to enable the Court to decide the cause, at once, in our favor, than a proper understanding of the will, and the application to it of the article 1705 of the Civil Code.

To show how the questions involved in this case strike other minds, somewhat acquainted with it, I will here insert an anonymous and rather mysterious brief, which was printed and circulated by some person unknown to the counsel for the States, during the progress of the trial in the lower Court. It contains some striking thoughts, and presents some features of the case in bold relief:

"McDONOGH'S WILL.—'I hope I don't intrude;' but I would like to say a word on the subject.

Old McDonogh has not bequeathed, nor did he ever intend to bequeath anything whatever; no, not the first demi-dime, to the cities of New Orleans and Baltimore.

We need not bother ourselves about substitutions, *fidei commissæ*, institution of heirs, nullity of conditions, modes, &c.; but the whole solution is in the will itself, fairly interpreted.

What does the Will say?

'If I die, without dying; if I can give, and yet keep; if the Legatees can have, and yet not take; if I can own, after I am dead; if I can make a law, above the law; if I can prohibit my Legatees from doing what I could not bind myself, when alive, not to do; if I can do and command these and many

other illegal and impossible things, I bequeath my estate to the cities; but *if* they and I cannot do this, and I am well aware that we cannot; THEN, I bequeath the whole succession purely and simply to the States of Louisiana and Maryland.'

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Now this is the sum and substance of *McDonogh's* will. Turn it which way you please, it means nothing else. Don't imagine that I dodge your 1506 art. of the Code. It does not fit the case. Certainly, if I bequeath my estate to *Sam*, *if he can touch the sky with his finger*, *Sam* will, by your law, take the estate; for it is the rule, to annul impossible conditions rather than destroy the Will itself; but when I go *further*, and, foreseeing the event, say, that *if* the condition is not or cannot be performed, I choose another person to be my absolute heir. What then? Ay, what then? 'there is the rub.' Does not a case arise to apply other rules than those of art. 1506?

When I say, 'I give my estate to *Sam* *if* he touches the sky with his finger, but *if* he cannot, I give all to *Tom* without condition; it is clear that I, in fact, give to *Tom*. To contend that, in such a case, *Sam* should take absolutely as if the impossible condition were not written, is evidently to defeat the expressed Will of the testator; for, he has declared, that *if* his estate is to go unconditionally to any one, it shall be *Tom*, and not *Sam*. This intention is clearly expressed, to exclude *Sam* as an unconditional heir, and to prefer *Tom* as such.

Art. 1506 fits a case where no provision is made by the testator, himself, for the contingency. Then, the law steps in, and as no other alternative is presented, and in order to come as near as possible to the testator's desire, gives the estate unconditionally to *Sam*: always on the principle that effect, as far as the law permits, should be given to the Will.

But the present case is not such a one; and presents a conditional alternative, which offers no difficulty of solution under art. 1506; and, under authority, quoted by Merlin in his *Repertoire de Jurisprudence*, tit. *Legs*, sec. 8, ¶ 8, art. 5, vol. 9, p. 704, 5th edition.

All the authorities by the cities, relate to cases where impossible conditions were imposed upon the legatees; and where, at the same time, no provision was made for a substitute, in the event of the impossibility being recognised.

Let them show, if they can, a case where the legatee, under an impossible condition, was ever preferred to the substitute instituted without charge, condition or mode.

That's the point! Hoping 'I don't intrude,' I remain, yours truly,

PAUL PRY,

Of Counsel for the State."

During the course of my oral argument, I was stopped by the announcement from the Court, with the apparent concurrence of every member of the bench, that there was no doubt the bequest to the cities was a *fidei commissum*; but that the question was, whether the bequest was saved by any of the exceptions to *fidei commissum* that were reprobated? Whether, in fact, it was not a *fidei commissum* not reprobated?

The general rule of law is, that all *fidei commissum* are reprobated. If the bequest of *McDonogh* to the cities be saved by any exceptions to that general rule, it was certainly incumbent on the opposing counsel to have shown it. Up to the time the above suggestion fell from the Court, there never had been an attempt to point out any such exception. The existence of certain exceptions to the sweeping language of the art. 1507, C. C, was well known. The rule for ascertaining those exceptions had long been settled. Mere naked trusts or *fidei commissum*, uncoupled with any interest and susceptible of immediate execution, were not embraced in the prohibitions of that article. But no one had ever been so rash as to contend that the bequest to the cities fell within that class of exceptions. It is believed that the above rule covers every imaginable exception, which can exist to the prohibition against *fidei commissum* contained in art. 1507, C. C. The bequest to the cities is not saved by that rule, it must therefore be classed among the reprobated *fidei commissum*, and declared null.

During the oral argument, owing, I now believe, to a misapprehension of a suggestion from the bench, for the first time the counsel for the cities did affect to have discovered another exception to the Art. 1507, C. C, viz: in Art. 1536, C. C.

This article is found in that part of our Civil Code which treats of the manner in which donations *inter vivos* shall be accepted.

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Art. 1532 directs that donations to married women are to be accepted by the authorization of their husbands.

Art. 1533. Donations to minors must be accepted by their tutors.

Arts. 1534 and 1535. Donations to persons under interdiction, and to the deaf and dumb, are to be accepted by their curators.

Art. 1536. Donations made for the benefit of an hospital, of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments.

Whoever before imagined that these articles formed exceptions to Art. 1507? If any one of them be an exception, they must all be. If the administrators of the poor of a community can accept donations involving substitutions and *fidei commissæ*, and thereby render them valid, so may the tutors of minors, and the curators of persons interdicted.

There are two radical errors running throughout the arguments of our adversaries:

1. In their construction of the will.

2. In their imagining there is something in the nature of municipal corporations which enables them to rise superior to the law, and permits them to hold property by titles which, in the hands of individuals, would be classed as substitutions and *fidei commissæ*. There is no foundation for any such distinction. If any difference existed, it should be against the corporations, rather than in their favor. The first struggle against the perpetuation of estates was against corporations. It is usual in this country to insert, in all special acts of incorporation, limitations upon their right to hold property, and upon their duration, imposed for the avowed purpose of guarding against the danger of the accumulation and perpetuation of estates in their hands.

The only reason they are not imposed with the same uniformity in the charters of municipal corporations, is, that from the nature of our institutions, such corporations can have none but delegated powers. To execute the limited powers of government entrusted to them, they have no power or right to enter the market as traders in property, and whenever they are thus allowed to deal in property, it is only done by virtue of a special authority conferred by law. If they possessed such a power, merely as corporations, without any special authority, why is it that we find so much legislation in our statute books, conferring upon the city of New Orleans the power of holding and disposing of property? The statutes, giving the power to the old corporation, were extremely guarded, and confined it within very narrow limits. The act of 1836, dividing the city, greatly extended the limits, in vesting this power in the different municipalities; but no law authorised this corporation to hold property by tenures or titles reprobated by our Code, or to legalize in its hands substitutions and *fidei commissæ*.

Messrs. Coin-Delisle, and others, (referred to by Mr. Graihle at p. 36,) say: "In our opinion, the word *fidei commissæ* was added to the Art. 896 of the French Code, in Art. 1507 of the Louisiana Code, on account of the English origin of the other States of the Union, and in order to prohibit at once both the substitutions of the old French law, and the trusts of the English law."

The Supreme Court of the United States, after quoting the Art. 1507, decide, "This abolishes express trusts." 2 Howard, 650.

If, then, the bequest of *McDonogh* to the cities creates what, in the common law, would be styled a trust estate, it is forbidden by Art. 1507, and must be declared null.

Now, no one can read the subjoined list of authorities without being satisfied that *McDonogh's* bequest to the cities would, in a common law State, be pronounced a trust estate.

1 Jarman on *Wills*, p. 334, et seq; 2 Story's Eq. p. 295, 8, p. 452, 8; the case of *Girard's Will*, 2 Howard, 131; *Inglis v. Sailor's Snug Harbor*, 3 Peters, 119; *Baptist Association v. Hart*, 4 Wheaton, 27; *Wheeler v. Smith*, 9 Howard, 56.

I have thus, I trust, satisfactorily shown—

1st. From a proper construction of the will, the intention of the testator was that his property should go to the States, under the contingencies which have arisen.

2d. That the Court having pronounced the bequest to the cities a *fidei commissum*, it is not saved by any of the exceptions to prohibited *fidei commissæ*.

McDonogh's bequest to the cities embraces a scheme, which, to carry out his intentions, must be preserved entire. Any departure from his instructions, especially the alienation of the property, destroys the whole scheme, and, in fact, destroys the will. It is conceded that those instructions cannot be complied with by the cities. In that event he never intended the cities to get the property, but desired it to go to the States, in whose discretion he placed greater confidence. To defeat his intention, in this respect, would be to defeat or destroy his will.

To give the property to the cities absolutely, would not be executing *McDonogh's* will, but making a new and altogether different one.

To let the cities take the property, subject to the prohibitions against alienation, partition and compromise, would overthrow our express laws against the perpetuation of estates, and the whole course of our jurisprudence upon the subject of tying up property out of commerce.

To sustain the bequest, and execute it, as the will directs, would be engrafting upon our law the complex machinery and doctrines of trust estate, at common law.

Under these circumstances we cannot see how the Courts can hesitate to give a judgment in our favor, which seems called for by every consideration of expediency and public policy.

[The Briefs of the Counsel in this case would make a volume. The Reporter, therefore, did not feel himself at liberty to publish them. The preceding abstract of the argument of the counsel for the States of Louisiana and Maryland, was prepared by *Mr. King*—as was also the abstract of the supplementary brief filed by him. *Mr. Hunt* had prepared an abstract of the argument of the defendants—but suggested that the "Opinion" prepared by *Coin-Deleale*, and other French Jurists, embraced all the points that were relied on by himself and colleagues—and that if that was to be printed—as he thought it should be—it would be quite unnecessary to publish what he had written. As this "Opinion" has been alluded to in high terms by the Court—as it has been very generally commended by the bar—and as it presents fully, and with marked ability, the legal positions taken by the Counsel for the defendants—the Reporter considered that he would be doing a service to the Profession by giving it a permanent form in the Reports.]

OPINION ON MR. McDONOGH'S WILL.

In this case a testator leaves all his worldly estate to two cities: to the one, because it was his birth place; to the other, because it was his adopted home. The property of the donor is extensive. The States of Louisiana and Maryland have discovered, or, at least, painfully strive to discover, fanciful substitutions and imaginary *fidei commissæ*, supposed to be lurking in these donations; and, by virtue of the same will, which they declare to be invalid in some of its dispositions, they claim for themselves the property which the testator has disposed of in favor of the two cities.

The cities of New Orleans and Baltimore resist a pretension which would strip them of the endowments vested in them by the testator's bounty. The facts are as follows:

STATEMENT OF THE FACTS OF THE CASE.

John McDonogh, a native of Baltimore, an inhabitant of McDonoghville, State of Louisiana, made his olographic will at McDonoghville aforesaid, on the 29th of December, 1838, according to the forms prescribed by the local law.

No question is raised about the form of the instrument; nor could it be otherwise. The Civil Code of Louisiana gives every man the right of making an olographic will. Such a will, in Louisiana, as in France, is one written by the testator himself; and, in order to be valid, it must be entirely written, dated and signed by the testator's own hand. (Art. 1581.) This kind of will is subject to no other form, and may be made anywhere, even out of the State. [Same art.] These are the same rules as those contained in arts. 970 and 999 of the French Civil Code.

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John McDonogh died in October, 1850. His will was proved in due form of law.

This will has been printed at New Orleans at full length, with the testator's instructions appended, under the title of "The last will and testament of *John McDonogh*, late of McDonoghville, State of Louisiana; also his Memoranda of instructions to his executors, &c." We do not mean to give it here *in extenso*, deeming a synopsis of it quite sufficient for our purpose.

The testator, after having called on the holy name of God, commences by declaring that he was never married, and that he has no heirs living, either in the ascending or the descending line. So that, according to the laws of the State, his power of leaving away his property was unlimited. [Civil Code of Louisiana, 1488.]

He orders that, immediately after his death, an inventory shall be made of his property, by a notary public, assisted by two or more persons, whom his executors shall appoint; the same to be done on oath.

First comes a devise to the children of his sister *Jane*, the widow of *Mr. Hamet*, of Baltimore, of land which he purchased on the 29th of February, 1819, of one *John Payne*, in Baltimore county. This lot, containing ten acres, more or less, together with the improvements, goes to his nephews aforesaid, a life estate in the same being, however, reserved to their mother.

He also bequeaths to his said sister, widow *Hamet*, six thousand dollars, recommending to her so to place the capital as to make the interest support her in her old age.

He then bequeaths their freedom to certain slaves, fixes a fifteen years' term of service to be performed by certain others on his plantations, and orders the remainder of his black people to be sent to Liberia by the American Colonization Society.

And now, in language expressive of piety towards God, and charity towards mankind, the testator, (after having made these deductions for his sister, *Mrs. Hamet*, for the children of his sister, and for the freedom of a certain number of slaves,) goes on to lay down what may be called emphatically his will [Printed Will, pp. 7 and 8.]

He gives, wills and bequeaths all the rest, residue and remainder of his estate, real and personal, present and future, as well that which is now his, as that which may be acquired by him hereafter, at any time previous to his death, and of which he may die possessed, of whatsoever nature it may be, and wheresoever situate, unto the Mayor, Aldermen and Inhabitants of New-Orleans, his adopted city, and the Mayor, Aldermen and Inhabitants of Baltimore, his native city, and their successors forever, in equal proportions of one-half to each of the said cities of New Orleans and Baltimore.

He wills, at the same time, that the entire mass of property thus bequeathed and devised, shall remain charged with several annuities, or sums of money to be paid by the devisees of his general estate, out of the rents of said estate.

He adds, that the legacies to the two cities are for certain purposes of public utility, and *especially* for the establishment and support of free schools in said cities and their respective suburbs, (including the town of McDonogh, as a suburb of New Orleans,) wherein the poor—and the poor only—of both sexes, of all classes and castes of color, shall have admittance, free of expense, for the purpose of being instructed in the knowledge of the Lord, and in reading, writing, arithmetic, history, geography and singing, &c., &c.

This is the principal object of the testator's bounty, as appears by the words which usher in the general devise: "And for the more general diffusion of knowledge, and consequent well-being of mankind, convinced as I am, that I can make no disposition of those worldly goods which the Most High has been pleased so bountifully to place under my stewardship, that will be so pleasing to him, as that by which the poor will be instructed in wisdom, and led into the path of virtue and happiness, I give, &c."

For the execution of his will, and with the unequivocal intent of increasing his real estate, after his death, the testator [p. 33] appoints executors, to whom he gives the seizin of all his personal estate, corporeal and incorporeal [p. 32], and clothes them with the most extensive powers, without the interference of judicial or extra-judicial authority. [p. 33.]

As relates to his real estate [p. 8], such as it will be found to be at his death, which estate he has just devised to the cities of New Orleans and Baltimore, he

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expressly forbids the Mayor, Aldermen and Inhabitants of each of the cities, and their successors, ever to alienate or sell any part thereof; but the cities shall let the lots improved with houses, to good tenants, by the month or year; they shall let the unimproved lots in New Orleans, its suburbs, town of McDonough, or elsewhere, for a term not to exceed twenty-five years at any one time, the rent payable monthly or quarterly, and to revert back, at the end of said time, with all the improvements thereon, free of cost, to the lessors; and, as to the lands, wherever situate in the different parishes of the State, the cities shall lease them in small tracts, for a term not to exceed one to ten years, revertible back with their improvements, to be re-leased for a shorter time, and at higher rates.

As concerns his personal estate, (which, as we have seen in the general bequest above, also belongs to the cities of New Orleans and Baltimore,) the testator [p. 9] instructs his testamentary executors to invest his personal estate of all kinds, as well as the amount of all debts owing to him, as fast as they are received, together with the interest and increase, in real estate of a particular description, to wit: lots of ground, improved and unimproved, lying in the city or suburbs of New Orleans, and to hand over said real estate, with the title deeds, to the commissioners and agents of his general estate, so that, by said means, the whole of his estate, real and personal, shall become a permanent fund on interest, as it were, (viz: a fund in real estate affording rents;) no part of which fund shall ever be touched, divided, sold or alienated, but shall forever remain together as one estate, termed in his will "The General Estate," and be managed as hereinafter directed. [p. 9.] The net amount of the revenues collected annually shall be divided equally, half and half, between the two cities of New Orleans and Baltimore, by the Commissioners and Agents of the General Estate, after paying the several annuities and sums of money herein-after provided for, and applied forever to the purposes for which it is intended.

The testator, dividing into eight equal portions the revenues of his estate, thus made up of the immovables left at his decease, and of those which shall be acquired by his executors, with the aid of his personalty and the interest accruing on his credits, gives and bequeaths the FIRST EIGHTH PART of the net yearly revenue of the whole, during forty years, to the American Colonization Society for colonizing the free people of color of the United States; but the society shall not receive or demand, in any one year, a larger sum than twenty-five thousand dollars. [p. 10.]

He gives and bequeaths the SECOND EIGHTH PART of the net yearly revenue of the whole, to the Mayor, Aldermen and inhabitants of the city of New Orleans, until said eighth part of the net yearly revenue of rents shall amount to the full and entire sum of six hundred thousand dollars; and that for the express and sole purpose of establishing an Asylum for the poor of both sexes, and of all ages and castes of color. [p. 10.]

He gives and bequeaths [p. 13] the THIRD EIGHTH PART of the net yearly revenue of the whole to the Society for the relief of destitute Orphan Boys of New Orleans, for the express and sole purpose of its being invested in real estate, until the annuity shall amount to the full sum of \$400,000, exclusive of the interest which may have accrued on it.

He gives and bequeaths [p. 14] the FOURTH EIGHTH PART of the net yearly revenue of the entire estate to the Mayor, Aldermen and Inhabitants of the city of Baltimore, for the express and sole purpose of establishing a School Farm on an extensive scale for the destitute male children of Baltimore, of every town and village of Maryland, and of the great maritime cities of the United States, until the said eighth part shall amount to the sum of \$3,000,000.

There now remains the revenue of one-half, or four-eighths of the revenue of what the testator styles his General Estate. The two cities of New Orleans and Baltimore being the principal legatees, it is obvious that they are entitled to the four-eighths not bequeathed by a particular title: consequently, it is laid down [p. 16, at bottom,] that, until such time as these four annuities bequeathed under a particular title shall have been paid off and expire, the cities of New Orleans and Baltimore shall receive, for the establishment and support of said free schools, one-half only of the net yearly revenue of rents of the General Estate, and no more.

Moreover, the total amount to be received by each of the legatees of one-eighth of the revenue, until the respective sums of \$25,000, \$600,000, \$400,000,

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or \$3,000,000, are realized, shows that one of the annuities is to determine before the others are paid off. The testator, therefore, orders that, as soon as any one of the annuities shall be filled and paid off, the proportions of the net yearly revenue of rents of the General Estate, which were payable under the extinct annuity, shall go and be payable to the annuity bequeathed to the city of Baltimore for the establishment of a School Farm; so that the \$3,000,000 may be made up in as short a space of time as possible. It will not be till the full and entire discharge of the annuities that the two cities will divide between them the net yearly revenue of rents of the General Estate. [pp. 15, 16.]

We will now turn our attention to the means and devices adopted by the testator to improve the condition of his particular legatees.

He forbids [p. 8] the alienation of the real estate which he leaves, at his death, to the two cities, and points out how the houses shall be let for short terms, the unimproved lots let for 25 years at most, so as to be revertible, together with all improvements, to the mass of his estate; and the lands leased out so as to bring in returns more and more ample.

He also orders [p. 9] his testamentary executors to invest his personalty in houses and building lots in New Orleans and its suburbs.

He has not ordered any thing of the kind for the \$25,000 of the Colonization Society [*first eighth*, p. 10.]. The sum is a small one, and can be paid off in a short time.

But, as respects the Society for the relief of destitute Orphans, [*third eighth*, p. 13.] he gives this third-eighth part of the revenues to be first deposited in one or more of the Banks in New Orleans, which allow interest on deposits; and then, always with the approbation of the Mayor, Aldermen and Inhabitants of New Orleans, who shall become parties to the deeds, the said Society shall invest the money, as good purchases offer, in houses and lots lying in New Orleans and its suburbs, so that such real estate, once acquired, shall be inalienable, and shall forever be retained and held by it, and remain its property, in order that the revenue of said real estate may be sufficient for the support of the institution.

With respect to the particular legacy bequeathed to the city of New Orleans for the purpose of establishing an Asylum for the Poor, [*second eighth*, p. 11.] he orders that, annually or semi-annually, the amount of the fractions of eighths be invested, as the Commissioners receive it, in bank stocks, or other good securities on landed estate, on interest, so that the capital of \$3,000,000 may be thereby augmented up to the time when the last of the annuity shall be received from the General Estate; that, after this period, (or even earlier, if a favorable opportunity occur,) one third of the whole (not more) be invested in the purchase of landed estate, in the erection of buildings and the furnishing of necessary articles; and the remainder, or two thirds at least, invested in the purchase of such houses and building lots in New Orleans and its suburbs, as will probably greatly augment in value; which real estate, when purchased, shall never be alienated, but a permanent revenue derived therefrom for the support of the institution.

Again, as regards the particular legacy bequeathed to the city of Baltimore for a School Farm [*fourth eighth*, p. 14 and following.] which legacy is to reach the amount of three millions of dollars, to be taken out of the eighth charged therewith, and out of the other three eighths, as soon as the other three legacies are finally paid off, the fund must be increased as it is received, by investing the moneys in bank stocks, or other good securities on landed estate, on interest; and this capital, with its increase, shall be invested, for one sixth part at the utmost, in the purchase of such land, animals and agricultural implements as the institution shall need; and the other five sixths invested in the purchase of houses and building lots situated in the city, suburbs and vicinage of Baltimore, or of tracts of land in its immediate neighborhood, viz: such lots or lands (to be all purchased under fee simple titles) as will probably greatly augment in value. And, in this instance too, the real estate, when purchased, is never to be sold or alienated, but is to remain forever the property of the institution, to the end that a permanent revenue may be derived therefrom.

We will now examine the measures taken by the testator to prevent the cities from giving the moneys a different destination from that prescribed by the testator.

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Not content with appointing testamentary executors, *McDonogh*, wishing to debar the city corporations from the handling of moneys, has ordered that there be Commissioners of his Estate, having a principal and central office in the city of New Orleans, where all the muniments and papers relating to his affairs may be kept, as well for the Asylum for the Poor, [p. 11] for the investment of the moneys due to the Orphan Relief Society [p. 14], for the School Farm of Baltimore [p. 17], as for the management of the General Estate or fund for the education of the poor [p. 21]. These Commissioners are to have the sole management of the General Estate, the leasing and renting of its lands and houses, the cultivating of its estates, the collecting of its rents, the paying of the annuities bequeathed as above, and are to do all acts necessary to its full and perfect management. [p. 22.]

These Commissioners cannot be members of the City Councils; but they shall be appointed by the City Councils of New Orleans, as regards the Asylum for the Poor [p. 11]; by the Mayor and City Councils, as respects the School Farm at Baltimore, with the style of Directors; [p. 17] by the respective City Councils of New Orleans and Baltimore, as to the management of the fund for the education of the Poor.

New appointments shall be made annually, on a day fixed by the will. (pp. 11, 17, 21.)

The City Councils shall have a supervision over their operations; and to them the Commissioners are liable for the performance of all their duties, and must annually render an account of their administration. (pp. 11, 17, 23, 24.)

Besides these Commissioners, each city shall have agents on the spot to represent its Commissioners; and these agents shall also be appointed by the Mayors and City Councils. (pp. 21, 22.)

And, after the payment of the annuities, the respective Commissioners or the agents representing them shall receive one moiety of the net revenue of the year, to be disposed of conformably to the will. (p. 23.)

As for the purchases to be made, before the full payment of the annuities, by the Commissioners of the Asylum for the Poor, they must be approved by the Mayor and City Councils of New Orleans. (p. 13.) The same rule is laid down for the purchases to be made by the Directors of the School Farm. They must be approved by the Mayor and City Council of Baltimore. (p. 19.)

The testator recommends (p. 13) to the Commissioners of the Asylum for the Poor, to apply to the Legislature of the State of Louisiana for an act of incorporation, subject, always, however, to the conditions provided for in the will. He has also recommended (p. 19) in the same language and under the same conditions, to the Directors of the Farm School, to apply for the same purpose to the Legislature of the State of Maryland. He recurs to the same idea in p. 27, using the same phrasology; and with the intent, no doubt, that his *General Estate* should become a juridical person, he also recommends to the Commissioners to sue out an act of incorporation for said *General Estate*, always subject to the conditions laid down in the will.

We omit a variety of minute regulations concerning the publication of the annual accounts, the building and locality of school-houses and residences for teachers, the school organization, the immense lands for the Poor Asylum, together with the high-flown disquisitions in which the testator indulges. All this matter appears to be foreign to the controversy. The whole may be reduced to these few words: "*The Cities are the devisees; but the administration of the property devised shall be carried on for ever by Commissioners appointed by the Cities, and accountable to them; and it shall be the duty of said Commissioners to hand over the moneys to the new public institutions which the testator orders to be created.*"

The testator goes on to say: "No compromise shall ever take place between the Mayor, Aldermen and Inhabitants of Baltimore, and those of New Orleans, or their successors, in relation to their respective rights to my General Estate."

"Neither party shall receive from the other, by agreement, a certain sum of money annually, or otherwise, for its respective proportions. Neither party shall sell its respective rights under this will, to the General Estate, to the other or to others; but said General Estate shall for ever remain, and be managed, as I have pointed out, ordered and directed.

"And, should the Mayor and Aldermen of New Orleans, and the Mayor and Aldermen of Baltimore, combine together, and knowingly and willfully violate

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any of the conditions hereinbefore and hereinafter directed, for the management of the General Estate, and the application of the revenue arising therefrom, then I give and bequeath the rest, residue, remainder and accumulations of my said General Estate, (subject always, however, to the payment of the aforementioned annuities,) to the States of Louisiana and Maryland, in equal proportions, to each of said States, of half and half, for the purpose of educating the poor of said States, under such a general system of education as their respective Legislatures shall establish by law—(always understood and provided, however, that the real estate thus destined by me for said purpose of education, shall never be sold, or alienated, but shall be kept and managed as they, the said Legislatures of said States, shall establish by law, as a fund yielding rents for ever; the rents only of which General Estate shall be taken and expended for said purpose of educating the poor of said respective States, and for no other.) And it is furthermore my wish and desire, and I hereby will, that in case there should be a lapse of both the legacies to the cities of New Orleans and Baltimore, or either of them, wholly or in part, by refusal to accept, or any other cause or means whatsoever, then, both or either of said legacies, wholly or partially lapsed, shall enure, as far as it relates to New Orleans, to the State of Louisiana, and, as far as it relates to Baltimore, to the State of Maryland, that the Legislatures of those States, respectively, may carry my intentions, as set forth in this my will, as far and in the manner which will appear to them most proper."

The above is a faithful analysis and summary of the will.

After the death of the testator, *McDonogh*, the States of Louisiana and Maryland instituted a suit in one of the State Courts of Louisiana against the cities of New Orleans and Baltimore, with a view to avoid the legacies bequeathed to said cities.

The collateral heirs have also impeached the will. They might have intervened in the suit brought by the States; but they preferred seeking their remedy in the Circuit Court of the United States.

To dwell on this suit would be unnecessary. The will is valid in its external form. It was made in the olographic form, agreeably to art. 1581 of the Louisiana Code, which is but a paraphrase of art. 970 of the French Code, coupled with art. 999 of the same. In both countries, when the olographic will is entirely written, dated and signed by the testator's hand, it is subject to no other form, even if made out of the State. It cannot, therefore, be on the external form that the collateral heirs rest their grounds of avoidance. Neither can they rest them on the rights of relationship. Wherever the testamentary power has been established, a will or testament is an exertion of human liberty and of human volition over property. The law guarantees that this last request shall take effect. The law-appointed descent or distribution of property is ousted by the testator's will, unless there be exceptions laid down in the law itself. Now, the laws of Louisiana make no exception but for the case of the existence of children and descendants, or that of the survivorship of the deceased's father and mother (Louisiana Code, 1480, 1481); and art. 1483 speaks unequivocally: "When there are no legitimate descendants, and in case of the previous decease of the father and mother, donations *inter vivos* or *mortis causâ* may be made to the whole amount of the property of the disposer."

There is but one exception to this art. 1483, which ends with these words, "saving the reservation made hereafter." This reservation is spoken of in art. 1484: "The donation *inter vivos* shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole." But this enactment has nothing to do with wills. From the very fact that art. 1483 allows a man to give away all his property *inter vivos* or *mortis causâ*, when he has neither ascendants nor descendants, from the fact that this article speaks of a reservation; and this reservation, in the following article, is made only for the case of a donation *inter vivos*, the necessary consequence is that the same Code makes no reservation, imposes no limits on donations *mortis causâ*, nor on testamentary dispositions by which such donations are effected. *Qui dicit de uno, negat de altero*.

And art. 1564 says explicitly what the combined articles 1483 and 1484 say implicitly: "By will, the testator disposes of his property, either universally or under a universal title, or under a particular title."

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The universal legacy carries seizin with it, so that, in respect of property given in entirety, either universally or under a universal title, there is no room for a succession *ab intestato*. This is an unavoidable deduction from the title *Of Successions*, in the same Code, especially from art. 871, which distinguishes three sorts of successions, the testamentary, the legal, and the irregular, and places the testamentary succession foremost, as having precedence over the succession *ab intestato*. The will of man ousts the law. *Dicat testator et erit lex*. This also results from articles 875 and 880, and still more strongly from article 934: "There are three kinds of heirs, which correspond with the three species of successions described in the preceding articles, to wit:

- Testamentary or instituted heirs;
- Legal heirs, or heirs of the blood;
- And irregular heirs. (875.)

The person who has become the universal successor of the deceased, who is possessed of all his property and rights, and who is subject to the charges for which the estate is responsible, is called the heir, whether he be such by law, by the institution of a testament, or otherwise. (880.)

A succession is acquired by the lawful heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds. *This rule refers as well to testamentary heirs as to instituted heirs, and universal legatees, but not to particular legatees.* (934.)

We ask by what right collaterals could lay claim to the property of a relative who has made his will according to the laws of the country where he had his domicile, and where he was at the time of making his will. How could they support such a claim in the face of a law which, similar in this respect to the French law, (article 913 and following,) establishes no reservation or legitime in favor of collaterals of any degree, not even of brother and sister? In the Roman law, there was no legitime but for descendants and ascendants. In a single case, the brothers of the whole blood, or those of the half blood on the father's side, could, we will not say, claim a legitime, but punish the disgrace put upon the family by the deceased, when the latter, by his will, had instituted heirs of bad character and blemished reputation: "*Consanguinei fratres contra testamentum fratris sui vel sororis de inofficioso questionem movere possunt, si scripti heredes infamiae vel turpitudinis, vel levis notae macula aspergantur.*" (Cod. Justin. lib. 3, tit. 28, l. 27.) Assuredly, such a law was never applied to a case where the testator gave his property to renowned communities, and for the benefit of his fellow citizens. The French law, which has given to the legitime pretty nearly the extent which it had in the *pays de droit écrit*, has not even let in the case provided for in Justinian's Code: in article 732 of the French Code, as at a later period in article 881 of the Louisiana Code, the rule *paterna paternis, &c.*, was abolished by the declaration that, "The law does not take into consideration the origin nor the nature of the property, in order to regulate the succession;" and after searching discussions, the French law-giver rejected every reservation or legitime in favor of collaterals, even of brothers and sisters, induced thereto by the forcible remarks of the House of Tribunes (Fenet's *Recueil*, vol. 12, pp. 444, 445): "But if there are none but collaterals, even brothers or sisters, or their descendants, there can be no sufficient motives for hampering the power of disposal. It is in the nature of man to look upon this privilege as one of the most precious boons. It is also the generating principle of a feeling of dignity; and it may well be reckoned among the means of arousing emulation and industry. Men cling with most pertinacity to what may afford most enjoyment; and it is undoubtedly an enjoyment securely to indulge the thought that we shall be able to reward good offices, or to help a friend. Nor will family ties thereby be loosened. On the contrary, perhaps it will be a means of drawing them tighter. A childless man will be better protected against the unkindness or ill treatment of his collaterals, when they shall know that he has it in his power to punish them."

It is perfectly plain that all this is applicable here, the laws of Louisiana being framed in the same spirit as the French laws; that the suit instituted by the collaterals can be supported by no arguments appropriate to their cause; and that the suit brought by the two States against the two cities, claims alone our attention.

To this latter suit we will, therefore, return.

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The points insisted on by the States against the cities of New Orleans and Baltimore, were the following :

1. That it was the purpose and intention of the testator, as shown by the will, and carried out by the legacies, to convert all his personal estate into real estate, and render the real estate so purchased, as well as the vast quantity of real estate of which he died possessed, forever inalienable ; to create a capital of real estate perpetually increasing, which would ultimately embrace all the landed property in the country ; to establish a fund so large as to be ruinous to commerce, and dangerous to the peace and prosperity of the State. All which purposes are illegal, contrary to public policy, and render the said legacies void.

2. That it was the intention of the testator, in making those legacies, to convey his property to be held by a title unknown to the law. As the law requires an owner for every species of property, and as the title created by the legacies is not recognized by the law, they are null.

3. That the said legacies are substitutions and *fidei commissa*, which are expressly forbidden by law.

4. That the said legacies are made upon impossible conditions ; are contrary to public policy, and are made to persons and corporations having no capacity to receive. They are, therefore, null.

5. That, as the said legacies are void, all the annuities and other legacies dependent on them must, necessarily, fall with them ; but if not, then all the annuities and all the legacies which were to be paid out of the said legacies to the said cities, are subject to the same objections, and are null and void, for the same reasons which have been hereinbefore urged against the validity of the legacies to the said cities.

The will was not to be overthrown by such arguments. It was sustained ; but the States took an appeal, and the two cities rest their defence on the following grounds :

1. That the cities of New Orleans and Baltimore are, by the will, instituted legatees under a universal title ;

2. That, by virtue of this institution, they are clothed with a full right of ownership over the property of the succession ;

3. That the absolute right of ownership in their favor results manifestly from the express terms of the will, "I give, will and bequeath, &c.," repeated in various passages of the instrument ; and it results also from the prohibition to alienate the immovables ; since such a prohibition could only be addressed to the true owner, and likewise from the cities being forbidden to compromise in relation to the succession, and to attempt a partition of the property belonging to it, &c.

4. That the cities have the capacity to take.

5. That this double institution is made subject to certain charges, conditions and modes, which the cities are willing to carry out and perform, if possible.

6. That if, among these charges, conditions, modes or obligations, any are found which the Courts pronounce to be illegal, impossible or contrary to public policy, they must be deemed not written, and be erased from the will, without the testamentary institution being in the least affected thereby.

7. That under the head of impossible or illegal conditions, the Roman law, the act (French) of 1791, article 900 of the Napoleon Code, article 1506 of the Louisiana Code, the decisions of the Courts of France, and the text books of her illustrious jurists, embrace not only the condition, properly so called, which suspends the vesting of the gift, but especially every kind of impossible or illegal condition, mode, direction, obligation or clause.

8. That the plaintiffs who could lay claim to the succession only in case it had been declared not to belong to the two cities, have no present interest in the question, and cannot be allowed to moot it, since the legatees under a universal title first instituted, are alone entitled to profit by the nullity or lapse of such legacies as cannot be fulfilled but by a violation of the law.

9. That the testamentary penalty inserted in the will in favor of the States of Louisiana and Maryland, (known in law under the name of *translation de libéralité*), is not incurred, and cannot vitiate the universal institution in favor of the two cities, if the conditions, charges or modes on which this translation *nomine pæne* is based are deemed not written, and consequently performed, the non-performance or non-fulfilment of these charges and conditions not laying at the door of the instituted heirs.

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10. That the dispositions under a universal title which are impeached, contain neither substitutions nor *fidei commissa* prohibited by our laws; that *fidei commissary* substitutions are essentially, and of their very nature, impossible, incompatible with, and irreconcilable to, the perpetual existence of the instituted cities.

11. That the testator's principal object may be attained, and his charitable and philanthropic intentions accomplished, even though the immovables of his succession should not remain perpetually inalienable, and although the heirs instituted by the will should be prevented from strictly pursuing the mode of administration pointed out.

12. That, in the present case, the principal object which the testator had in view, was that the revenues of his estate should be applied to the diffusion of public education, and to other purposes of general interest; but that the means recommended by him for the attainment of that end, are not essential to the validity and maintenance of the institution; that they only constitute a *mode*, not obligatory on the heir, and the *forced* non-observance of which cannot, consequently, in anywise affect the testamentary institution.

13. That, whilst it is admitted that a testator has, during his lifetime, an absolute right over the property which is to form his succession, the proposition is not to be understood so as to allow him to prescribe FOREVER a mode and system of administration for such property; that such a direction on his part, has always been, and of right ought to be, deemed not written, and of no validity; for otherwise, the unavoidable result would be, the absolute negation of the right of property; and the living generations would be thus wholly debarred from the exercise of this right, which is continuous and imperishable, and would remain the slaves of by-gone generations, with whose bones this precious right of property, the groundwork both of society and of civilization, would be buried.

Such are the grounds relied on by both the contending parties. The Counsel for the city of New Orleans, one of the legatees, has requested the five undersigned advocates in the Paris Court of Appeals to give their opinion on all these points. The latter have considered of the subject, and are of opinion that the controversy presents the following questions:

I. Supposing the bequests made to the two cities, by whatever title soever, *whether by universal title*, as the general legacy of the residue for the more general diffusion of knowledge, or *by particular title*, as the bequest made to the City of New Orleans, for the purpose of establishing an Asylum for the Poor, and that made to the City of Baltimore for the purpose of establishing a School Farm, supposing them, we say, to be tainted with conditions void, impossible, illegal, contrary to public policy, first in the formation of said legacies, by the investment of the testator's personal estate in immovables, by the inalienable character of the General Estate, by the absorption of vast tracts of land for the benefit of one corporation, or otherwise; secondly, in the carrying out of said legacies, in respect of their being made under conditions, charges and modes impossible to be executed or contrary to the laws, to good morals or to public policy, would it follow that said legacies would be null in themselves that they would vanish, and that the cities could not claim them?

On this first question, which embraces the first and fourth positions of the plaintiffs, and which likewise embraces the latter part of the fifth position together with the sixth, seventh, eleventh and twelfth positions of the cities, THE UNDERSIGNED ARE UNANIMOUSLY OF OPINION, that, if, (excepting the case of a substitution) the conditions, charges or modes imposed by the will on the formation of the legacies or their execution, are morally or physically impossible, contrary to the laws or to good morals or to public policy, said conditions, charges or modes are *ipso facto* reputed not written; that consequently, they are in the eye of the law as if they were not; that the will is cleared and discharged of them by the mere power of law; and that, as a further consequence, there remains but one legacy or principal disposition, the fulfillment of which can be insisted on.

II. Are the bequests made to the cities of New Orleans and Baltimore tainted with and made void by substitutions or *fideicommissa*!

This second question corresponds to the third position of the States, and to the tenth of the cities.

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On this second question, THE UNDERSIGNED ARE ALSO UNANIMOUSLY OF OPINION that the will, which they have examined in its whole extent, contains none of the substitutions or *fideicommissa* prohibited by art. 1507 of the Louisiana Code; and that a disposition by which a bequest is made to an existing corporation, such as a city, to the intent that the whole or a part of the moneys shall be applied towards erecting, or causing to be erected, another corporation for public purposes beneficial to the City, is not and cannot be either a substitution or a *fideicommissum*.

III. Was it really the intention of the testator to dispose of his property without transferring the ownership?

This third question corresponds to the second position of the plaintiffs, and to the first, second and third positions of the defendants.

On this third question, THE UNDERSIGNED ARE UNANIMOUSLY OF OPINION, that the cities are the full and perfect owners to the property devised, and that the attempt to avoid the legacies has no support in law.

IV. Have these bequests been made to corporations having no capacity to take? Are the legacies, the object of which is to provide the cities with an Asylum for their poor, a School Farm, and a regular system of education for destitute children, null and void, and are the annuities granted to the cities to be denied them?

This fourth question embraces the fourth position of the plaintiffs, and the fourth of the defendants.

Here again, THE UNDERSIGNED ARE UNANIMOUSLY OF OPINION, that the question must be answered in the negative, the bequests having been made, not to corporations not yet in being, but to the Cities themselves, with the charge of having such corporations erected. This is applicable as well to the bequests of annuities as to the general devise of the testator's estate.

V. Can the translation to the States of the bequests made to the two Cities take place merely, because the specific performance of these bequests is impossible, contrary to the laws, to good morals or to public policy?

This fifth question corresponds to the first and fourth positions of the States, and to the eighth and ninth positions of the Cities.

Here again, THE UNDERSIGNED ANSWER IN THE NEGATIVE, because the nullity of a condition, reputed not written, is such that, on the one part, in the eye of the law, the testator never could have willed it, and, on the other, the legatee could never have entertained the thought of fulfilling it, in so far as it was morally or physically impossible; whence it follows that it is legally reputed absent from the will, and that, as a further consequence, no one, not even the legatee appointed to take in the case of non-performance of the charges, can set up against the legatees originally instituted the non-fulfilment of a charge impossible or contrary to the laws, to good morals and to public policy.

VI. If the municipal administrators of the cities had thought that such or such conditions, charges or modes of the legacies were impossible, contrary to the laws, to good morals or to public policy, and had even claimed judicially or extra-judicially, to be released from a particular condition or charge, or relieved from a particular mode of execution, would that have worked, *ipso facto*, a loss of the legacy and a translation of the same to the behoof of the States?

This question relates only to a particular point of view contained in the eighth position of the Cities.

On this sixth question, THE UNDERSIGNED ARE OF A POSITION that, should it arise in this controversy, it must be answered negatively, because the governors of a city, or other corporation, have no right of ownership over the property belonging to the corporation which they represent; that, consequently, an error on their part could be looked upon as an act of administration only, and not as an abandonment of property over which they have no disposing power.

VII. Has the case arisen, which is provided for in p. 28 of the printed will, at the words "And should the Mayor," and which lays down forfeiture and the translation of the legacies by universal title as the penalty?

THE UNDERSIGNED FEEL NO HESITATION IN ANSWERING IN THE NEGATIVE, both for the reasons set forth under the preceding questions, and because harsh provisions ought always to be construed strictly, and not to be extended by equity.

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VIII. Has the case of a lapse arisen?

THE UNDERSIGNED, without a moment's wavering, ANSWER IN THE NEGATIVE, for a legacy can never be said to lapse, but when it is absolutely without effect.

IX. Is a legacy tainted with an illegal condition, when the testator has prescribed forever a scheme and plan of administration for his property, and when he has manifested the intention of having his personalty invested in realty, in order to form a capital of immovables, so as, in the same State or Country, to place an enormous mass of landed property in the hands of one or several corporations?

This ninth and last question is drawn from the first position of the States and from the thirteenth of the Cities.

THE UNDERSIGNED, in this particular case and with relation to *McDonogh's* will, ARE OF OPINION that the testator, in the conditions to which he has subjected his property, has exceeded the powers given by the law to testators; and that, consequently, several of these conditions are void, or may become so by their exaggerated character, as we shall show more at length in the ninth section of this argument.

But, THE UNDERSIGNED must add that, in their opinion, this last question is superfluous as regards the controversy, and can possess no interest, but for the future.

ARGUMENT.

§ I.

The undersigned commence by admitting for the sake of argument, that the general bequest to the two cities, and the object of which is the more general diffusion of knowledge; that the particular legacy to the city of New Orleans for the purpose of establishing an Asylum for the Poor; that the particular legacy to the city of Baltimore for the purpose of establishing a School Farm, are all, or one of them, tainted with conditions void, impossible, illegal, contrary to public policy, either in their formation, because the law, or the nature of things, will not allow the deceased, after his death, to direct the increase of his property and to order the accumulation of a new mass of immovable wealth; or because, in the charges and modes imposed on the cities for the execution of the legacies, it would be impossible to perform them in as full and specific a manner as the testator pointed out; or because the testator's directions might offend, in some point, against the laws, good morals or public policy.

And, with this admission for the sake of argument, they express a deliberate and matured opinion, that the nullity of the condition, charge or mode of execution, impairs in no respect the right of the legatees; that the legacies are not the less valid; that the cities will not the less have a vested right to the legacies; that the conditions alone of the legacies must be erased, because the law itself erases them by reputing them not written, agreeably to the well settled rule in regard to wills. *Utile per inutile non vitiatur.*

It will be remarked that we do not discuss the nullity of the conditions. We take the word of the States for this nullity. The language of the States to the Cities amounts to this: "In what respects you, the bequests made to you are so fraught with danger to the public interest, if you execute them with the charges imposed, that we insist on the avoidance of the conditions, and consequently the avoidance of the legacies; but let your minds be easy: the immense fortune of the testator shall not be lost; and we claim it for ourselves."

In reply, the cities point to art. 1506 of the Louisiana Code, drawn from the Roman Law, which, on this point, has ever been followed in France, and especially from art. 900 of the French Civil Code: * Every impossible condition, or

* TEXTS OF THE ROMAN LAW.

Gail Inst. Comm. §, § 96. Legatum sub impossibili conditione relictum, nostri præceptores proinde valere putant ac si ea conditio adjecta non esset.

Instit. Justin. lib. 2, tit. 14, § 10. Impossibilia conditio in institutionibus et legatis....pro non scripta habetur.

Digest, lib. 35, tit. 1, § 1. 3. Obtinuit impossibiles conditiones testamento adscriptas pro nullis habendas.

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condition contrary to the laws or to good morals, is reputed not written in a will, nothing remains but the institution which is valid.

This is, therefore, the dilemma which the cities put. Either the conditions, charges or modes of our legacies are lawful and possible to be executed. In this case, we will execute them, and we claim the legacies. Or these conditions, charges and modes are illegal and impossible, as the States contend. And in this case, article 1506 expunges the conditions, charges and modes, and here again we insist on retaining the bequests made to us.

And why so? Because, when the law declares that she reputes conditions of this kind not written, she exerts her volition above the volition of man; she even exerts it in so sovereign a manner, that she nowhere assigns her motive therefor. Gains sought it in vain: *Et viz idonea . . . ratio reddi potest* (Inst. Comm. 3, § 98.) No doubt the law willed it thus, because the instituted heir or legatee is a stranger to the testator's plans; perhaps even she intended to punish the testator for having abused the power intrusted to him. It is out of our province to search for the motive. Our portion is to obey the law, and not to scrutinize its reasons. *Non omnium quæ a majoribus constituta sunt ratio reddi potest; et ideo rationes rerum quæ constituntur inquirenon oportet; alioquin multa ex his quæ certa sunt subvertuntur.* Dig. lib. 1, tit. 8, ll. 20, 21.

The cities are, therefore, entitled to retain the legacies, whether the conditions are possible and lawful, or impossible and illegal.

What matters it, we ask, if the States should declare it contrary to the laws that the testator should have ordered his testamentary executors to invest his personalty in realty? that he sought by this transmutation of his property, to create a fund of landed estate, which might ultimately swallow up the whole territory of a city, the whole territory of a State? that they should declare it contrary to law to have made this immovable capital inalienable, to have directed the creation of a mass of landed wealth so considerable as to jeopardize the interests of commerce and to endanger the public peace and tranquillity? What even would it matter if they should insist on the nullity of the condition that the property given to the cities for determinate objects and purposes should be forever administered by others than the city corporations?.... What will the States have achieved when they have proved that all these conditions are impossible of execution, or that they are, wholly or in part, contrary to the laws, to good morals, or to public policy?....Nothing. They will have reduced the bequest made to the two cities to a pure and simple legacy, or to a legacy modified only by the conditions found compatible with public policy and the laws.

We boldly assert that nothing is less open to debate or cavil than the bequest by universal title made to the cities at p. 8 of the printed will, since, after the deduction of the legacy to *Mrs. Hamet's* children and to *Mrs. Hamet* herself, and the other bequests there mentioned, it is nothing more than a legacy of the rest, residue and remainder of the testator's personal and real estate present (that existing at the date of his will) and future (that existing at the time of his death)—all which he explains in these words: "as well that which is now mine as that which shall be acquired by me hereafter, at any time previous to

Digest, lib. 28, tit. 7, l. 1. Sub impossibili conditione vel alto mendo factam institutionem placet non vitari.

Digest, lib. 30, tit. 1, l. 112, §§ 3 & 4. Si quis scripserit testamento fieri quod contra jus est vel bonos mores, non valet; veluti si quis scripserit contra legem aliquid, vel contra edictum prætoris, vel turpe aliquid. Divi Severus et Antoninus rescipserunt iusjurandum contra vim legum et auctoritatem juris in testamento scriptum nullius esse momenti.

Digest, lib. 28, tit. 7, l. 14. Conditiones contra edicta Imperatorum, aut contra leges, aut quas legis vlcem obtinent, scriptæ, vel quæ contra bonos mores, vel dæcoriæ sunt, aut hujus modi quas prætores improba-verunt, pro non scriptis habentur. Et perinde ac si conditio hereditati vel legato adjecta non esset, capitur hereditas legatume.

And other laws scattered here and there.

TEXTS OF THE FRENCH LAW.

Loi du 5 et 12 Septembre, 1791.

Toute clause impérative ou prohibitive qui serait contraire aux lois et aux bonnes mœurs est réputée non écrite.

Code Civil des Français, art. 900. Dans toutes dispositions entre vifs et testamentaires, les conditions impossibles, celles qui seront contraires aux lois ou aux mœurs, seront réputées non écrites.

CIVIL CODE OF LOUISIANA.

Art. 1506. In all dispositions *inter vivos* or *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed not written.

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my death, and of which I may die possessed." Thus we see the testator has given nothing but the property forming his succession, and the legacies by universal title do not bear, in any respect, on the property to be acquired after his decease. It is vain to talk of the investment of personal effects in real estate, and of the accumulation of the revenues in order to form with the whole a *General Estate*. It is not this *General Estate* which is the object of the universal title, it is the estate *as found at the testator's decease*; if the purchases and revenues are to go to augment the *General Estate* for the benefit of the two cities, it is because the purchases are to be made with the moneys belonging to the cities *testamenti jure*, and because the fruits belong to the cities *accessionis jure*; and all this is nothing more than an investment, made agreeably to the testator's will, of moneys belonging to the legatees by universal title from the day of the testator's death, and of revenues yielded in a due course of management by the legatees' own property.

We conclude that the disposition by universal title, purified* by the very nullity of the condition, is in no respect open to objection, and that the property belongs to the cities, universal legatees.

And still the States contend that art. 1506 of the Louisiana Code only speaks of conditions properly so called, that is to say, of those on which the existence of the legacy depends, and not of the interests, charges and modes with which the legacies are bound by a testator.

This is an abuse of words, a mere quibble. *Condition*, in its *extended* signification, means every quality or manner of being which makes a determinate thing to be what it is and nothing else. This word is derived from *condere*, to give being and form to a thing, to form it, to found it. The French Academy, under the word *condition*, defines it thus: "La nature, l'état et la qualité d'une chose ou d'une personne." (The nature, state and quality of a thing or of a person.)

In a *more restricted* signification, it means *the event*, without which a thing cannot come to be. In the language of the law, especially, it is what is called a *suspensive condition*, when a testator or a contracting party makes the existence of a legacy, of an act, of a purchase, of an obligation, to depend on a future uncertain event. (French C. C. 1040, 1168; Louisiana C. C. 1691 and 2016.)

But this restricted and special meaning is so far from taking away the general and extended acceptation of the word, that this same Dictionary of the French Academy, which exhibits the language as it stood in the days of Louis XIV, adds, "Condition also signifies *the clauses, charges, obligations, in consideration of which a thing is done.*"

Thus, the wording of the article 900 of the French Civil Code, and of article 1506 of the Louisiana Code, when they say that conditions impossible, or contrary to the laws, or to good morals, are, in a will, reputed not written, embraces not only the condition in its restricted meaning, (that which suspends the taking effect of the gift,) but also every kind of impossible or illegal charge, mode or clause, since those enactments make use of the general term *condition*, in its broad signification, and to restrict its meaning, would be to curtail the purview of the law. For what is a mode or charge imposed on a gift? It is everything that restricts the extent of the donation, with regard to the donee; everything that impairs, abridges or diminishes the boon. A right of reverter and a substitution are modal charges or dispositions; the same may be said of particular legacies, of obligations to do or to give, imposed on the universal legatee or legatee under a universal title. All these constitute charges or modes of legacies; and although, before the accruing of the reverter, or of the substitution, the delivery of the particular legacies, or the fulfillment of the obligations to do or to give, the legacy exists by itself, (as the substance before the accident, which is no part of its essence,) whereas, the conditional legacy has its being from the happening of the condition only, these charges and modes are not the less, both in the language of the unprofessional, and the language of the law, conditions of the legacy or institution which they modify; and which, consequently, are reputed not written, if they are impossible physi-

* *Purified*. A term peculiar to the French law. A disposition is *purified*, that is to say, becomes a pure and simple disposition, when the condition is either fulfilled, or released, or extinguished, or deemed no longer to exist.

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cally, morally or legally, but without any disparagement to the legacy, which exists independently of the illegal or impossible accident.

There was no doubt about this point in the old French law. Let us hear what Domat says, *Lois Civiles*, liv. 3, *des testamens*, tit. 1, sec. 8, n. 7. That illustrious jurist, after having laid down a specific distinction of the conditions, charges, appointments and motives which are met with in wills, goes on to say: "Although the conditions, charges and appointments are distinguished as we have just shown, the word *condition*, as used in our language, often comprehends the charges and appointments."

If the reader seek a proof that this word is taken in this extent, in our laws, let him open the French Code, at articles 954 and 1046, and the Civil Code of Louisiana, at articles 1546, § 3, and 1708, and he will see that the non-performance of the conditions imposed by a *donation inter vivos*, or by a will, may be a cause of revocation of the legacy or the donation. These articles, therefore, speak of the clauses or charges of performance imposed on the donee or legatee. The law, therefore, gives the name of conditions to the imperative clauses and modal dispositions with which testators charge their legacies.

Again, if an illegal charge or a prohibited modal disposition, added to a legacy, tainted it *ipso facto* with nullity, article 896 of the French Civil Code, and article 1507 of the Louisiana Code would never have been written; for both prohibit substitutions, and both declare that not only the charge of preserving and restoring to the substitute shall be null, but the principal legacy also. Why did the French lawgiver, in 1804, and the Louisiana lawgiver, in 1824, thus order the matter? Because, in the absence of an express enactment, the institution or principal legacy would have remained, and the substitution alone would have been deemed not written, according to the tenor of article 900 of the one Code, and article 1506 of the other, as a condition contrary to the laws. For, though substitutions were abolished on the 14th of November, 1792, the institutions or legacies made with a charge of substitution in the interval between 1792 and 1803, when article 896 of the French Civil Code was first promulgated, were valid, and an action lay for their recovery, for the very reason that, during the aforesaid period, the substitution was considered to be a condition not written.

Thus, nothing can be better ascertained than that article 1507 of the Louisiana Code, and article 896 of the French Code, were framed, in order to create, with respect to the charge of substitution, an exception to article 1506 of the former Code, and article 900 of the latter. The common spirit of both systems is, therefore, evidently, that a legacy should not be avoided on account of the invalidity of the charge: *utile per inutile non vitiatur*.

Not that the undersigned pretend that there is no exception to article 900 or 1506; they have just been citing one, for the case where the charge is a substitution. They can adduce several others. Thus, a donation *inter vivos* is not annulled by a condition contrary to the laws, and will, nevertheless, be null, if that condition destroys the essence and the nature of the donation *inter vivos*, as conditions depending on the donor's will alone, or which leave him the means of increasing, at his pleasure, the charges imposed on the donee. (French Code, articles 944 and 945; Louisiana Code, articles 1516 and 1517.) But all these exceptions result from positive enactments; they confirm the general rule, and bring additional proof that the word *condition* comprehends all that modifies the principal disposition, either for the present or for the future.

Here a kindred remark suggests itself. The English law has also adopted the general principles of the Roman law, on the doctrine of impossible conditions in will.* But let it be borne in mind that, even if there should be found,

* The writers of this opinion do not wish to be understood as deciding a question of English law; they confess, as becomes men trained in the laws of their own country, that they would not attempt to speak authoritatively on a system of law foreign to their national system. But their assertion here is founded on a valuable and learned English work, "The Law Dictionary," by *Tomlins*, reprinted at Philadelphia in 1836, vol. 1, p. 419, *Vo. Legacy*:

"By the civil law, which has been adopted in our Courts of Equity, [1 Eden, 116.] and which differs from the common law as regards devises of real estates, when a condition precedent to the vesting of a legacy, (*now, this is certainly the suspensive condition of the French law.*) is impossible, the bequest is discharged of the condition, and the legatee will be entitled, as if the legacy were unconditional. [Swinh. p. 4, c. 6, pl. 2, 3, com. rep. 73.]

"Where the performance of a condition subsequent (*note, this is our condition taken in its most extensive sense, for the charges imposed on the legatee, when in possession,*) is illegal, then as well as the common law as by the civil law adopted in the courts of equity, the condition is void, and the bequest freed from it." [Co. Litt. 206; a. b.; Mad. 32.]

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either in the English law, or in some particular texts of the Roman law, any exceptions to these general principles, annulling at one blow the condition and the legacy, it is not by a recurrence to those English precedents, or to those Roman laws, that the question can be solved; the rule of decision must be the local laws of Louisiana, and article 1506 of the Louisiana Code. For the law which exclusively governs wills is the law of the testator's domicile. Now, this law is a Civil Code, framed, like the French Code, with the ruling idea of disentangling jurisprudence from the previously prevailing customs and laws.

This article 1506 is, therefore, a special law of the State of Louisiana; it is conceived in the most general terms; and, to escape from it, there must be found some special derogating enactment in a posterior statute, emanating from the Legislature of the same State.

On the other hand, supposing the pretended nullities in the conditions, clauses, charges and modes of the legacies, to be real, the cities are willing to execute the legacies, *if it is possible*; they wish to fulfill the principal end of the testator, and to carry out his charitable and philanthropic intentions, even though the immovables of the succession should not remain for ever inalienable, even though the cities should find themselves prevented from strictly pursuing the mode of administration chalked out by the testator himself. If there is a real impossibility, *natura et legibus*, of strictly conforming to the scheme of administration pointed out, at least the cities will attain the chief end which the testator had in view, by applying the revenue of his estate to the diffusion of public education, and to other purposes of general interest.

Under § IX, we shall inquire whether there is any impossibility in the clause of execution. Here the undersigned have only one point to consider, which is whether the nullity of a clause of execution dispenses the legatees from executing the charges of the legacies, if it is possible to execute them, and as far as it is possible.

Certainly not; nor do the cities think so. On the contrary, they are ready to carry out the charges, as far as in them lies, and herein they act in strict conformity to law. For, it is only so far as a condition, charge or mode might be impossible or contrary to law, that said charge or condition would be considered not written; if it is compound, and legally possible in one part, impossible in another, this latter part only will be rejected; but what is possible, *natura aut lege*, must stand good as a legal volition legally expressed.

This is the doctrine which flowed from the Roman laws, and which before the Revolution of 1789, we had adopted in France as written reason; for, when we resorted to the Roman law for the construction of wills, *non rationis imperii, sed imperio rationis*, we discarded all its subtleties. If, in the same condition, says Furgole, (*Testaments*, ch. 7, sect. 2 & 27,) there is one part possible, and another impossible, that which is possible must be performed, and that which is impossible rejected; and he is supported by the following texts: Dig. lib. 35, l. 6, § 1, and Dig. lib. 33, tit. 4, l. 12. Such was also the doctrine laid down by Ricard, *Traité des Dispositions conditionnelles*, n. 286.

Now, nothing is more natural than to distinguish the substantial and *bona fide* performance of a legacy from the minute mode of execution pointed out by the will, if such mode is found to be impossible *lege aut natura*. The great point is that the revenues of the property should be appropriated by the cities to the works of charity ordered by the testator. If this is accomplished, the principal condition will have been fulfilled; the testator's desires will have been virtually performed by the rejection of everything which in its details might have been clogged by the laws or by an impossibility *de facto*.

§ II.

OF THE ALLEGED SUBSTITUTIONS OR FIDEI COMMISSA.

A second difficulty, raised by the States, is that the bequests under a universal title made to each of the two cities, are burthened with substitutions and *fidei commissa*, which would avoid the bequests themselves. This position is based on art. 507 of the Louisiana Code: "Substitutions and *fidei commissa* are and remain prohibited.

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"Every disposition by which the donee, heir or legatee is charged to preserve for or return a thing to a third person, is null, even with regard to the donee, the instituted heir or the legatee.

"In consequence of this article, the trebellianic portion of the Civil law, that is to say, 'the portion of the property of the testator, which the instituted heir had a right to retain, when he was charged with a *fidei commissum*, or fiduciary bequest,' is no longer a part of our law."

This article is taken, in its first part, from article 896 of the French Civil Code:

"Substitutions are prohibited.

"Every disposition by which the donee, the instituted heir or the legatee shall be charged to preserve for and return a thing to a third person, shall be null, even with regard to the donee, the instituted heir or the legatee."

In the opinion of the undersigned, *McDonogh's* will contains neither substitution nor *fidei commissum*, in the meaning of art. 1507 of the Louisiana Code, or in that of art. 896 of the French Code, from which the former was borrowed.

Besides, as it is a kind of disposition which the law proscribes and which carries with it the nullity of the principal disposition (contrary to the rule of law, *Utile per inutile non vitiatur*), since the right of making a will is a sacred right, the last solace that society affords to the citizen, and the last right which she guarantees, the words *substitutions* and *fidei commissum* must necessarily be taken in their most restricted sense, and it must be borne in mind that wills and the clauses contained in them, must always be construed so that the act shall stand, *magis ut valeat quam ut pereat*, a maxim of law of which article 1706 of the Louisiana Code has made a positive enactment: "A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none."

At the outset, we gave it as our opinion that there is no prohibited substitution in the will, and we are puzzled to find out in what such substitution can be made to consist. For, the substitutions aimed at by the law consist in the obligation on the part of the *gratatus* to preserve during his life, as owner, the property bequeathed to him, and to return it at his decease to the substitute who takes in the second degree, so that the substitution establishes, for the property subject to it, an order of succession different from that pointed out by law. All our authors are agreed that, when the period fixed for the surrender of the property is independent of the death of the *gratatus*, there is no prohibited substitution within the meaning of art. 896 of the Civil Code. See, on this point, Rolland de Villargues, *Des substitutions prohibées*, chap. 4, n. 57; Toullier, *Droit Civil Français*, t. 5, n. 22; Merlin, *Questions de droit*, *Vo. Substitution fideicommissaire*, § 6, and all the text books.

And the third position in the grounds of defence relied on by the cities answers, with singular appositeness, that substitutions are essentially and of their nature "impossible, incompatible with and repugnant to the perpetual existence of the instituted cities."

For a city is a moral person constituted in order to be perpetually renewed by the successive renewal of its inhabitants. Its essence will not, therefore, permit it to have any successors natural or artificial, and forbids that property donated to it should ever fall into the hands of another by *succession* or *substitution*. And, even should a city receive property with the charge of establishing some public institution for the benefit of the inhabitants, and of devoting the whole or part of the property thus donated to the inalienable endowment of such public institution, would that be a substitution? No. It would be a legacy with the charge of a specific destination for the behoof of the city, not burthening the city with the duty of preserving and returning, but with an obligation consisting in *faciendo*, nothing more.

Now, if the legatees were natural persons, and the legacy were of a sum to be employed in obtaining the degree of doctor, and for no other purpose; in building a house for the legatee, and for no other object; in providing a marriage portion for a daughter, and for no other purpose whatsoever, would any such legacy be one saddled with a substitution? We say, no, emphatically no, and for this reason: that there is but one gift made in *presenti* to a single person with the charge of a specific destination. Just so, in the case in hand, a testator gives, under a universal title to the instituted cities, the residue of his property, with the charge on the cities of allowing the personal estate to be in-

vested in real estate, of administering the General Estate by special commissioners, who shall acquire to the use and behoof of the cities in order to increase the fund and swell the revenues until certain portions of these revenues shall have produced revenues large enough to furnish the cities themselves with the means of establishing an Asylum for the Poor, a School Farm, and Public Schools, on the plan drawn up by the testator. Is there in all this any thing like a prohibited substitution? Not in the least. The testator does not give any thing either to the Asylum, or to the School Farm, or to the Public Schools. He gives to the cities alone, in order that they may cause the institutions which he deems necessary, to be created; and these institutions are really for the use and behoof of the cities; they are really municipal foundations. Let us even suppose that, once created, they become corporations by an act of the Legislature, and, consequently, civil persons having a peculiar existence and property, it will still be a fact that they were created for a municipal purpose, and that they will contribute to the well-being of the inhabitants, the renown, splendor and convenience of the cities. This vain idea of a substitution must, therefore, be discarded. Nothing can be found in the will but legacies to the cities with the charge of investments for their respective interests.

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But the States will say: "The Louisiana Code is more comprehensive in its purview than the French Code. The latter speaks of *substitutions* only; the former also speaks of *fidei commissum*." We will first remark that art. 1507 of the Louisiana Code is not to be understood even of those fraudulent *fidei commissum* which are made under the name of a capable person in order that the gift may reach an incapable person. The reason thereof is evident: just as the French Civil Code has reprobated such fraudulent *fidei commissum* in its art. 911, so has the Louisiana Code done it in art. 1478: "Every disposition in favor of a person incapable of receiving shall be null, whether it be disguised under the form of an onerous contract, or be made under the name of persons interposed." It is therefore clear that the *fidei commissum* in favor of incapable persons, which are reprobated and annulled even as to the first limitation by art. 1478, are not those which it is the object of art. 1507 to reprobate and annul even as to the first limitation. Nor does the latter article apply to legacies *with a charge*, for legacies *with a charge* are certainly lawful in Louisiana, and indeed everywhere, as good sense requires it. It is lawful in every country of the world to impose charges on one's own gift, *dare legem rei suae*, and art. 1708 of the Louisiana Code proves it by saying, with respect to the *forced heirs*, (in France called *héritiers à réserve*,) that *no charges or conditions* can be imposed by the testator on their legitimate portion; which is tantamount to saying that every other heir, even testamentary, can be burthened with charges, and that the forced heir can be burthened with them like any other, provided it be not on his legitimate portion.

In our opinion, the word *fidei commissum* was added to article 896 of the French Civil Code, in article 1507 of the Louisiana Code, on account of the English origin of the other States of the Union, and in order to prohibit at once both the substitutions of the old French law, and the trusts of the English law. Now, in no part of his will has *McDonogh* appointed any *trustees*. The cities have the legal estate of the property donated to them. The annual commissioners are not *trustees* but annual administrators, who have not either the possession or the use of the property which it is their duty to administer. The accumulations of funds and moneys are ultimately to turn to the advantage of the cities. The dispositions are, therefore, nothing more than legacies made to the cities, with the charge of investing them in a specific way, and for municipal purposes. In all this machinery there is neither substitution nor *fidei commissum*.

§ III.

OF THE PRETENDED WANT OF TITLE IN THE CITIES.

The undersigned have said on this point, that the cities have the perfect ownership of the property devised to them. In the law of Louisiana, article 866 of the Civil Code, just as in France, according to article 711 of our Code, "the property of things is acquired by inheritance, either legal or testamentary, by the effect of obligations, and by the operation of law."

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Succession is the transmission of the rights and obligations of the deceased to the heirs; and, in a second point of view, succession is the estate, rights and charges which a person leaves after his death [articles 867, 868]; it also includes all that has accrued thereto since the opening of the succession. [Article 869.]

There are three sorts of successions, the testamentary, the legal, the irregular, [Article 871.]

The person who has become the universal successor of the deceased, who is possessed of all his property and rights, and who is subject to the charges for which the estate is responsible, is called the heir, no matter whether he be such *by law, by the institution of a testament, or otherwise.* [Article 980.]

A succession is *acquired* by the lawful heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule refers as well to testamentary heirs as to *instituted heirs* and universal legatees, but not to particular legatees. [Article 984.]

This right is acquired by the heir *by the operation of the law alone*, before he has taken any step to put himself in possession, or has expressed any will to accept it. [Article 985.]

The heir being *considered seized* of the succession from the moment of its being opened, *the right of possession* which the deceased had, *continues* in the person of the heir, as if there had been no interruption, and independent of the fact of possession. [Article 986.]

Every legacy, not included in the definition before given of universal legacies, [Art. 1599,] and of legacies under a universal title, [Art. 1604,] is a legacy under a particular title. [Art., 618.]

Every legacy under a particular title, gives to the legatee, *from the day of the testator's death, a right to the thing bequeathed*, which right may be transmitted to his heirs or assigns; and this takes place as well in testamentary dispositions, universal or under a universal title, as in those made under a particular title. Nevertheless, the particular legatee can take possession of the thing bequeathed, &c. (Art. 1619.)

The best way of showing the law was to bring all the statutory texts together.

Livery of seizin is not any more in use in Louisiana than in France. Amongst us, formerly, it was only required for fiefs or fiefs. Since the abolition of the feudal system, all lands are allodial. It is the power of the law that transfers the ownership of things, and it makes the seizin result from the title deed that conveys the property. Here the investiture results from the will itself, from the quality of the legatee under a universal title, and from the above cited enactments, which require no commentary.

We even see, from article 1619 of the Louisiana Code, that the only modification made with respect to the particular legatee relates to possession alone; but even the particular legatee is the owner of the thing bequeathed him, by the mere effect of the will, since his right, if he has not made use of it, passes to his heirs. *A fortiori*, when a legatee has a universal title—as the cities have—he is the absolute owner of the thing bequeathed to him. One cannot, in Louisiana, be instituted a legatee under a universal title of the residue of a testator's property for one-half, without being, at the same time, *seized* by the death of the testator and the power of the law, of the undivided ownership of this residue.

This idea the cities have very well expressed in their first and second positions; nor can anything be more accordant with right reason than the third, which is a development of the first two.

The terms of the will are terms of disposal and command: "*I give, will and bequeath.*" They are universal terms as to the thing given: "*ALL the rest, residue and remainder of MY ESTATE, REAL AND PERSONAL, PRESENT AND FUTURE:*" they express grammatically the transfer of ownership from the person of the testator to the person of the legatees, "*UNTO the Mayor, Aldermen and Inhabitants of —.*" Now it is evident that, by virtue of the law of Louisiana, which confers the ownership on the donee, and clothes him with it by the mere effect of the will and of the opening of the succession, the cities, universal legatees, or legatees by a universal title, each for one-half, are invested

with the ownership and domain, even independently of the formalities which confer possession as to third parties.

Moreover, the will contains passages which help to put this truth in a still stronger light. It is because the cities are owners, that the testator thought it necessary to forbid them (p. 8, at bottom of printed will,) to alienate or sell any part of his real estate; it is because they are owners, that he had to resort to special dispositions to deprive their administrators in ordinary of the management of said estate. It is because they are owners that he confers on them the right of appointing, under certain titles, annual administrators of the mass of his property; it is because the cities are owners, that these administrators, under the title of Commissioners of the General Estate, are bound to render annual accounts to the cities; that the cities have a supervision of their doings; that the purchases made by the Society for the Relief of Orphans must be made (p. 13) with the approbation of the Mayor and Aldermen of New Orleans, who must be parties to the deeds; that the purchases made by the Commissioners of the Asylum for the Poor, must be approved by the Mayor and Councils of New Orleans; and the purchases made by the Directors of the School Farm, by the Mayor and Council of Baltimore. (p. 9.) It is especially because those cities are owners, that he forbids any compromise on their part, in relation to their respective rights, and that he insists on their remaining forever tenants in common, for it is impossible to suppose the right of compromising and of remaining tenant in common, without supposing the right of ownership.

But will it be contended that there is no ownership vested in the cities, for that very reason that there is a perpetual prohibition to alienate, which would constitute, apparently, an endless usufruct, without any real ownership? This would be an error contrary to all principles of law.

Undoubtedly, in the case of natural persons, of private individuals whose life is bounded by birth and death, the perpetual *jus utendi* stripped of the *jus abutendi*, would be a juridical chimera. But, in the case of a civil corporation, such as the cities of New Orleans and Baltimore, that is to say, "of an intellectual body, created by law, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of the individuals which compose it, (Louisiana Code, art. 418,) this college of inhabitants is capable of possessing, as owner, property which it will use and not alienate.

Indeed, it cannot be otherwise, from the very nature of things, for all that property the use of which is common to the whole city, as the streets, the markets, the town-hall, has an owner, to wit, the community; and if the law says (art. 474 of the Louisiana Code,) that things naturally susceptible of ownership may lose that quality in consequence of their being applied to some public purpose incompatible with private ownership, the law never meant to say that the State had not the dominion of the high roads established by State authority, or that cities had not the dominion of the streets and markets opened by them. Nothing more is meant by art. 474 than that, so long as things are in that predicament, the lands of the State or a municipal corporation cannot be *in commercio*, or become private property.

On the other hand, cities, in order to minister to certain public wants or purposes, may find it necessary to hold such property as is and forms *patrimonium civitatis*. And the Legislature has the power to declare certain property of cities to be inalienable. The Louisiana Code, in art. 476, speaks clearly on this point: "individuals have the free disposal of the property which belongs to them, under the restrictions established by law."

But, the property of the corporations of cities, or other corporations, are administered according to laws and regulations which are peculiar to them, and can only be alienated in the manner and under the restrictions prescribed in their several acts of incorporation.

Hence it follows that, when a private person gives to a city, even with the charge of never alienating, the gift is not the less a gift of the ownership; and if the city which is the object of the bounty derives a perpetual enjoyment from the thing, the city is not the less the owner of such thing, whether she appropriates it to a branch of the public service, or devotes its revenues to municipal purposes. The ownership is in her. It is as a city, and for her own exclusive interest, that she is deprived of the *jus abutendi* over her own property. Cities, public institutions or corporations can be deprived of the *jus abutendi* over

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things which belong to them, without their right of ownership being impaired. When the thing is devoted to some public use, there exists a state of ownership *pro indiviso*, resulting from that very public use; when the thing is inalienable in order to secure certain branches of the public or municipal service, the loss of the *jus abutendi* results, not from the ownership being vested in any other person, but from the city (a perpetual entity) having expressly or tacitly incurred the obligation of not transferring the property to others.

§ IV.

OF THE RIGHT WHICH THE CITIES HAVE OF ACQUIRING, EVEN FOR THE PURPOSE OF FORMING OTHER ESTABLISHMENTS OR CORPORATIONS.

Nothing can be more free from doubt than the right and capacity of the Cities to take property for themselves, or to the intent of forming establishments for municipal purposes.

We will first speak of the right and capacity of the Cities to receive by will for themselves.

The old jurisconsults of Rome were long of opinion that cities, bodies corporate and the other artificial entities, which they called *universitates*, were not capable of being instituted heirs, on the ground that one could dispose in favor of determinate persons only, and that corporations had no physical existence. A man could not leave his estate to a College of priests, but he could lawfully give it to the temple, in which they ministered (Fragm. of Ulpian, tit. 21, § 4, and tit. 25, § 5.). But gradually cities and all corporations or *universitates* came to be considered as individuals, and were accounted civil persons, when their formation had been authorized or recognized by the State. Thenceforth all companies, bodies or institutions sanctioned by the Sovereign Power, came to be ranked among persons capable of being instituted heirs. *Hereditatis vel legati seu fidei commissi aut donationis titulis, domus aut annonæ civiles aut qualibet ædificia vel mancipia ad jus inclytæ urbis, vel alterius cujuslibet civitatis, pervenire possunt*, says the Code of Justinian, lib. 6, tit. 24, l. 12. To the same purport are the laws 1, 14, 22, 23, of book 1, tit. 2, of that Code.

Thus, in the last stage of the Roman law, communities of inhabitants and all corporations could be instituted heirs, legatees and donees.

In France, in the latter period of the old monarchy, some restrictions were imposed on such acts of liberality, especially when they consisted of real estate, and the corporations instituted were ecclesiastical bodies. But the Civil Code was promulgated. In its 902d article, it enacts that "all persons may... receive either by donation, or by will, except such as the law declares incapable." The consequence is that cities, communities of inhabitants, public institutions, and all authorized corporations, which are, also in France, civil persons, are capable of receiving by will or by donation.

It was, therefore, not necessary that the Civil Code should declare their capacity to take, unless the intention of the Legislature had been to impose some limit or check on acts of liberality towards them. Such would be the course pointed out by logical accuracy to a lawgiver compiling a body of positive laws. *He does not enumerate capacities*; he establishes them for all, and only makes special enactments with respect to incapacities or abridgments of right.

Hence our art. 910: "Dispositions *inter vivos*, or by will, in favor of hospitals, of the poor of a parish, or of institutions of public utility, shall not take effect unless authorized by an order of the king in counsel."

Thus amongst us, cities, like private persons, have an unlimited capacity to take a legacy of any amount, under a universal title, or under a particular title; only, their capacity is restricted by the necessity of obtaining a decree of the head of the government before accepting. Such is the French law. Let us turn to the law of Louisiana.

Under the title of *Donations and Testaments*, chap. 2, it is said in art. 1456 of the Louisiana Code: "All persons may dispose or receive by donation *inter vivos* or *mortis causa*, except such as the law expressly declares incapable." This article, it will be seen, is still more peremptory than art. 902 of the French Code, for by this word "expressly" it forbids any incapacity being raised by reasoning or induction.

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The following articles, down to art. 1477, treat of the incapacity of giving and taking. Cities and corporations, legally authorized, are ranked among persons, and no article of this chapter declares them incapable. The cities have, therefore, a capacity to take, the law being silent on that point. Nor is this all.

The title X of book 1, of the Louisiana Code, treats of corporations. The 418th article defines them, and says that, "for certain purposes, they are considered as natural persons." The 420th article distinguishes corporations into political and private; under another point of view, article 421 distinguishes them into civil and religious, and article 422 places among civil corporations those which relate to temporal police, *such as the corporations of cities*, and art. 424 says, that corporations legally established are SUBSTITUTED FOR PERSONS, and further on, that "THEY ARE CAPABLE OF RECEIVING LEGACIES AND DONATIONS." So that the proposition, contained in the fourth ground of the plaintiffs, "that the legacies have been made to persons and to corporations who have no capacity to accept them," is a proposition confuted by the very text of the Louisiana Code.

All the legacies are made to the cities themselves, the general legacy by way of universal title, the special legacies of annuities for a School Farm and for an Asylum for the Poor, are also made to the cities, not even to be taken out of the legacy under a universal title, but only out of the fruits and revenue thereof. It is certain, and no body thinks of disputing the point with the plaintiffs, that the testator could give nothing to the School Farm, or to the Asylum for the Poor, since these institutions did not exist at the opening of the succession, and since none can take who does not exist.

Now this is the second branch of the proposition. Has the testator given to a corporation which did not exist?

The undersigned answer no, and they have already touched upon this answer above, pp. 34 and following.

The testator has left a particular legacy of annuities to New Orleans herself, a particular legacy of annuities to the city of Baltimore, in order that the former may open an Asylum for the Poor, and the latter, a School Farm. Therefore, neither the Asylum for the Poor nor the School Farm is a legatee under a particular title. The only legatees under a particular title are the cities, with the charge of investing the annuities at some future day in the erection of two useful institutions, an *Asylum for the Poor and a School Farm*.

We have already shown, pp. 45 and following, that these were nothing else but two particular legacies made *with a charge*, and that the only question is whether the charge is possible or not, legal or not. This has been treated of under § I.

But the States will probably say: If the commissioners to be annually appointed by the cities carry out the recommendation to obtain, so soon as they are inducted, an act of incorporation for the Asylum of the Poor, the Farm School, and the Free Schools for the Poor of both cities (p. 27, line 19 and line 30,) these four different establishments will then become the owners of the testator's fortune. Therefore, these future establishments are the true recipients of the testator's bounty.

This we, once more, deny. A testator does not bestow his bounty on an institution which does not exist, even should he order it to be created and richly endowed; but he bestows his bounty on a city when he provides it with the means of banishing mendicancy from its precincts; when he furnishes it with the means of raising a population of poor men, but of men trained up from childhood to the hardy toils of husbandry, initiated in the first rudiments of letters, and improved by a moral and religious education; when he helps it to the means of imparting to poor children of all classes, conditions and castes of color, born in the cities and their suburbs, the first and necessary instruction which enlightens mankind as to their religious and moral duties, and prepares them, by the elements of literary knowledge, to practice the mechanic arts and the various lines of business, without needing the help of others to read, write and cipher.

This needs no proof: it is self-evident. The cities alone are the recipients of the testator's bounty. The Asylum for the Poor, the School Farm, the Free Schools, are not. These future establishments or corporations will not be establishments of the creation of *John McDonogh*; they will be establishments of the cities themselves, created by the cities, at the suggestion of the testator.

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Thus, the annual Commissioners of the cities (when the annuities shall have reached the specified amounts,) will not call on their respective legislatures for the incorporation of the Asylum for the poor, of the School Farm, of the Free and Public Schools for the Poor, in the name of the testator; they will call for it as Commissioners of the cities for this purpose; they will call for it by virtue of the power conferred on them by annual election. And if the Legislatures sanction the erection of these new corporations, the corporations will not take the testator's property, as in a substitution, where the substitute or *fideicommissary* takes from the *gravans*, not from the *gravatus*; they will receive their property directly from the cities, who will thus have divested themselves in order to form institutions for their own advantage; they will receive *ab urbibus gravatis, non a testatore gravante*.

Moreover, should the States insist that the pretended charge of incorporating at a future day the Asylum for the Poor, the School Farm and the Free Schools, is a ground for avoiding the legacies, although it has been proved superabundantly that it is, at the very utmost, an impossibility which does not avoid anything, and that there would be neither a substitution nor a *fidei commissum*, nor absence of ownership in the cities: even in this case, and with the will spread before the court, the cities will prove that the testator never imposed on them, either by way of charge, condition or mode, the obligation of incorporating either the Free Schools, the Asylum for the Poor or the School Farm.

Assuredly, a city appropriating a portion of its property (even that which a testator has devised to it for that purpose,) to the annual support of like establishments, has the power of retaining the directors of said establishments among its own employees; of setting forth the costs of the creation and support of such establishments in the account of its municipal expenditures, without taking any steps for making corporate bodies of such institutions. That does not prevent the city from having Free Schools, an Asylum for its Poor, a School Farm; only, in that case, the establishments are part and parcel of the municipal *patrimonium* and administration, subject to the city government.

Now, all that the testator has WILLED, all that he has required by *words of command*, is that the annuities should be received out of the four-eighths of the remainder of his property until the cities can found these establishments; and that, till then, the other four eighths of the revenues should be employed by the cities in the public education of the poor, so that (the funds being made up by the accumulation of the annuities for the four particular legacies, first to the Colonization Society; secondly, to the city of New Orleans, for an Asylum for the Poor; thirdly, to the Society for the Relief of the Orphans of the same city; fourthly, to the city of Baltimore, for a School Farm;) the cities, legatees under a universal title, disincumbered of the burthen of the four particular legacies, may, thenceforward, devote the entire revenue of his succession to the gratuitous education of the poor of the two cities and their suburbs. Nothing more has he said by *words of command*. And assuredly, all that can be done without creating corporations, even should each charity be administered by annual commissioners.

But when he spoke of erecting the charities with which he charged the cities into corporations, or artificial beings clothed with their own personality, he did not make a disposition; he merely expressed a wish, a desire. He did not use the terms: "It is my will, and I direct," (p. 6,) and others which betoken a well-settled purpose. He has, on the contrary, made use of *prayer* and *advice*. He has not made it a charge of his will or his legacies.

In all the passages where he speaks of this subject, (p. 13, line 18; p. 19, line 18; p. 27, lines 19 and 30;) he does not say: "It is my will;" he merely says: "I also recommend," that is to say, I deem it expedient, I deem it useful that these charities should be incorporated, but that does not mean: "I direct that it be done."

Our interpretation is the more to be relied on, that the testator might well fear *all* his conditions would not be sanctioned by the Legislatures. And whenever he recommends the obtaining of an act of incorporation, he adds the clause: "subject always, however, to the conditions herein provided for." Therefore, this recommendation was only made in case the cities or their annual commissioners should conclude that the Legislatures would introduce no modifications; therefore *I recommend* is not an order, but the expression of a wish. An additional reason why our construction should be the true one, is,

that the last two lines of page twenty-seven of the printed will are quite in the language of dubitation: "Should it be necessary and desirable to have said institution incorporated."

Even were our interpretation erroneous, it ought to be adopted by the Court, if, as the States pretend, the charge of employing a legacy in the establishment and endowment of a corporation ought to avoid the legacy itself. For there is a principle of the Roman law that must always govern in the construction of an instrument, which is, that it must be construed *potius ut valeat quam ut pereat*, and this principle is adopted in article 1706 of the Louisiana Code, cited above.

Therefore, if the words *I recommend* are ambiguous; if they can be taken in a sense of command which would avoid the legacy made to the cities, or in a sense of prayer or advice, article 1706 would make it the duty of a court of judicature to take them in this latter meaning of *prayer or advice*, in order to uphold the legacies made to the cities, who would remain free to follow or not to follow the *prayer or advice* of incorporating.

Such is the constant rule of decision in France, whenever a legacy is burdened with a substitution which would annul the legacy itself.

When the charge of substitution is written in terms of command, the legacy is null; when the charge of returning the property is couched in terms of *prayer or advice*, the legacy is valid and the charge falls to the ground. On this point we refer to Toullier, *Droit Civ. Franc.* vol. 5, n. 27; Grenier, *Traité des Donations, Observations préliminaires*, n. X; Rolland de Villargues, *Des Substitutions prohibées*, n. 173.

In order to leave no doubt as to this position, which gives fresh corroboration to what the undersigned have said in §§ II and III, they will set forth the opinion of Merlin, given in a case of this kind, he being then Attorney General in the French Court of Cassation.

One *Bourge*, by his will had instituted his wife his universal heir. By art. 7 of the instrument, he *legged* (*il pria*) his universal heir to dispose of one moiety of his real estate in favor of his brother-in-law.

The testator's brothers sought to have the will set aside with respect to the moiety burdened with a substitution in favor of the brother-in-law.

The widow answered that art. 7 was expressed in precatory words; that the testator had *advised* not *commanded*; that she remained perfectly free, and that there was no substitution.

On April 4, 1807, the Court of Appeals of Brussels rejected the claim of the collaterals, "inasmuch as the disposition, in art. 7 of the will, is *not expressed in words of command*, and confers no right on him in whose favor the instituted heir is *requested* to dispose."

The brothers of the deceased filed their petition in error in the Court of Cassation. On January 5th, 1809, the Court dismissed the petition. Thus the will was sustained in its entirety, because *to beg, to advise, to recommend*, is not *to order, to dispose*. And Attorney General *Merlin* explained, in his *réquisitoire*, why the words "I beg, I wish," which are sufficient to express what is willed by a testator agreeably to law, are insufficient when he wills a thing prohibited by law:

"The reasons that might be assigned for imparting an obligatory force to the words 'I beg, I wish,' are counteracted, in our system, by a great principle furnished by the Roman Law itself; in case of doubt as to the meaning of a clause, a construction which tends to the validity of the act of which that clause is a part, must be preferred to a construction which would annul it. *Quoties in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur magis valeat quam pereat*. Dig. lib. 34, tit. 5, l. 12.

"It is true that such a construction of this clause (the precatory clause) renders it illusory. But, as there is a rule which in doubtful cases, deems the testator to have written nothing useless, so is there another which says that, in doubtful cases, a testator is not deemed to have attempted what the law forbids, and still less what would have drawn along with it the annihilation of his chief disposition. Now, in the clashing of these two rules, the first ought, beyond all dispute, to give way to the former, the second ought, uncontestedly, to prevail over the first." (*Merlin*, Argument delivered on January 5, 1809, *Répertoire de Jurisprudence*, Vo. *Substit. fidéicommissaire*, sec. 8, n. 7.)

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We could hardly avoid citing the above decision (which our courts of judicature have adhered to since 1809, and the legal accuracy of which has not been impeached since the promulgation of the Code,) because it answers all the questions embraced in §§ II, III and IV.

§ V.

OF THE TRANSLATION OF A LEGACY *PCENÆ NOMINE*, (OR GIFT OVER BY WAY OF PENALTY.)

Before entering on this point, the discussion of which is, undoubtedly, useful, since counsel have mooted it in America, THE UNDERSIGNED deem it proper to remark, that it is much more general than the questions that arise from the will itself.

The will says (p. 28, line 12,) that the legacies shall go from the cities to the States, if the two cities shall combine together, and knowingly and willingly violate the conditions laid down for the management of the General Estate, and the application of its revenue. Now, this is a case which has not arisen as yet, and which will be examined in § VII.

The same will says (p. 28, line 33,) that the legacies shall also go from the city to the State of which it is a part, in case of a lapse; and it will be shown, § VIII, that no lapse has taken place.

These are the only cases of translation of legacies provided for by the will.

With this preliminary remark we will proceed to the general question.

From the mere fact that the *literal* fulfillment of the charges, modes and conditions of the legacies bequeathed to the cities, is impossible or contrary to the laws, to good morals, or to public policy, does it follow that the transfer of legacies ordered by the testator ought to take place, from the cities first instituted to the States, who claim the benefit of this gift over?

Ethics and natural law answer in the negative.

Every transfer of a legacy deprives the legatee of a vested right, and deprives him of it by way of penalty.

Every penalty imposed on any one in case he should not fulfill a charge or condition contrary to the laws, to public morals, or to public policy, is an immoral or illegal penalty.

The infliction of an unjust, immoral, or unlawful penalty, if the courts gave it effect, would lead men to attempt impossible things (which would be folly,) or to violate the laws, good morals, or public policy, to secure to themselves the possession of the property given to them, (which would be criminal.) Therefore, in equity and natural law, when a legacy is burthened with conditions, charges and modes impossible, contrary to the laws, to good morals and to public policy, a testator cannot, in case the legatee should refuse to fulfill the impossible or illegal conditions, revoke it by a gift over, or by what is called a translation of the liberality.

The penalty and the translation of liberality *pœnæ nomine* ought to be allowed when the condition of the original legacy is legal and possible. The penalty and the translation of the gift *pœnæ nomine* are ineffectual when the condition or charge of the legacy is illusory and impossible. Such are the dictates of reason, of logic and of natural equity.

Let us now pass to the history of the law on this point.

Testators undoubtedly abused, at an early period, the absolute liberty of making a last will. They thought they had a right to tack on their will the most whimsical dispositions. But not only did the rule which grew into practice of regarding conditions physically or legally impossible as not written, bring back testamentary dispositions to rational principles; but another rule came to prevail about the time of the Antonines, which rule is, that institutions of heirship and legacies are acts of grace and beneficence, and that they ought not to be marred by penalties laid on the very persons whom the testator honors with his bounty. This rule was an offshoot from the doctrine of the philosophers which then so powerfully influenced legislation: "*Beneficium nullum est, nisi quod ad nos primum aliqua cogitatio defert amica et benigna*," Senec. lib. 6, *De Beneficiis*.

Capitolinus, in his *Life of Antoninus Pius*, says this emperor was the first who reprobated legacies by way of penalty: "*Primus constituit ne pœnæ*

causa legatum relictum maneret." He declared them all void, even when the condition was possible and lawful.

From *Antoninus Pius* to *Justinian*, every bequest, revocation or gift over of legacies *pæna causa*, was absolutely void. This absolute nullity was established without opposition for legacies in general; there had never been any difference of opinion as to the application of the principle except for institutions of an heir and legacies of freedom, but the controversy had died out in the days of *Marcus Aurelius*: *Pæna nomine* (says *Gaius*) *inutilitur legatur. Pæna autem nomine legari videtur, quod coercendi heredis causa relinquitur, quo magis aliquid faciat aut non faciat. . . . Sed nec libertas quidem pæna nomine dari potest, quævis de ea re fuerit quæsitum.* [Inst. Com. 2, n. 235, and n. 236.]

Ulpian says as much in his *Regul. Lib. tit. 24, De legatis*, n. 17.

Justinian himself acknowledges that, before his reign, all penal dispositions in wills were null and void: "*Pæna quoque nomine inutilitur legabatur, adimēbatur vel transferēbatur. Pæna autem nomine legari videtur . . .* (the remainder as in *Gaius*) *et in tantum hæc regula observabatur, ut quam pluribus principalibus constitutionibus significetur nec principem quidem agnoscere quod ei pæna nomine legatum sit.* [Instit. lib. 2, tit. 20, § 36.]

However, *Justinian* partially repealed the law of *Antoninus Pius*, by the law in the Code, lib. 6, tit. 41, *De his quæ pæna nomine in testamento, &c.*, and by the aforesaid § 36 in the Institutes: *Generaliter ea quæ relinquuntur, licet pæna nomine fuerint relicta, vel adempta, vel in alium translata, nihil distare a ceteris legatis constituimus, vel in dando, vel in adimendo, vel in transferendo: EXCEPTIS videlicet iis quæ IMPOSSIBILIA sunt, vel LEGIBUS INTERDICTA, aut alias PROBROSA: hujusmodi enim testamentorum dispositiones valere, secta mœorum temporum non patitur.* [Inst. lib. 2, tit. 20, § 36.] And in the constitution of 528, inserted in the Code *repetita prælectionis*, published after the Institutes, after having allowed testators to make penal dispositions against the heir, the legatee, the fideicommissary or the freedman, *si minus dispositionibus suis heres vel legatarius, vel libertate donatus paruerit*, the Emperor adds: *Quod si aliquid facere vel LEGIBUS INTERDICTUM, vel alias PROBRORUM, vel etiam IMPOSSIBILE, jussus aliquis eorum fuerit, TUNC sine ullo damno, etiam NEGLECTO TESTATORIS PRÆCEPTO, servabitur.*

Nothing can be more explicit. The law of *Antoninus* is preserved, and the testator's disposition is ineffectual, without the original legatee sustaining any damage therefrom, and without the possibility of ademption, revocation or translation taking place, whenever the legacy threatened with revocation, ademption, or translation, is tainted with conditions, charges or modes contrary to law.

To the same effect is the law of Louisiana. It does not say that every infringement of the conditions of a legacy will annul it or give a right of action for annulling it: it merely says, art. 1703 of the Code: "The same causes which authorize an action for the revocation of a donation *inter vivos*, are sufficient to ground an action for revocation of testamentary dispositions." Now, as art. 1506 reputes conditions impossible or contrary to the laws or good morals not written, the second legatee cannot have a better right to claim the revocation for his own benefit than the donor *inter vivos* could have, in case of the non-performance of these conditions so prohibited and reputed not written. The original legatee would answer the donor *inter vivos* with art. 1506, and thus also does he answer the second legatee: "The testator has instituted you to take as second legatee, in order to compel me *by fear* to do what is impossible or contrary to law; your second institution is as defective as the void conditions imposed on my legacy."

In vain will it be said that a distinction must be made between a case where the testator purely and simply revokes the legacy if the condition is not fulfilled, and a case where the testator has appointed another legatee, who will take the legacy by translation; that, in the first case, the threat is made *in terrorem*; that in the second, as there is a person capable of taking the benefit of it, the revocation by gift over must have its effect.

The ready and peremptory answer is as follows:

The position may be true sometimes when the condition which the legatee refuses to perform is legal and possible. Then, if the will contains no clause of translation, the Court, without discharging the condition, will consider it as inserted *in terrorem*, and will grant delays and accommodation to fulfil it, before

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allowing the property to go to the collaterals whom the testator certainly wished to deprive of it; but the Court will be more easily brought to decree a revocation, if there is a *third party* appointed to take the gift by translation.

But those who profess this doctrine must necessarily restrict it to the case where, the charges, clauses and conditions of the first legacy being legal, the original legatee has positively refused to perform what is possible and lawful: otherwise, they would violate art. 1506 of the Louisiana Code, and even the laws of *Justinian*. For, since the law reputes these conditions not written, it supposes by a legal presumption *juris et de jure*, that they are not in the will; it supposes it as well with respect to the secondary legatees as with respect to the testator himself. The secondary legatees cannot, therefore, base an action against the original legatees on the pretended non-performance of the conditions which the law itself declares not to exist in the will.

And let it not be said: "Why should it not be lawful to give to one on an illegal or impossible condition, and to make a gift over, if the person first instituted should not fulfill the condition?" Your alternative in favor of the second legatee will be nothing more than a continuation of the impossible or illegal condition. You will give effect to a violation of the law, if you allow a third party to improve his condition by the fact of the original legatee refusing to violate the law.

Thus are the cities obliged to come back once more to their dilemma: either the literal performance is possible and legal, and then we will perform; or we shall be arrested by the absolute impossibility of executing certain clauses, or by their repugnancy to law, and, in this case, the testament being purged of these conditions by the power of the law, the States have nothing to claim of the cities, and have no rights against them.

§ VI.

ON THE EFFECTS OF THE PERSONAL ACTS OF THE MAYORS AND ALDERMEN.

The proposition which will be developed in this section is entirely hypothetical, and if the undersigned touch upon it, it is because they know nothing more of the facts than what has been set forth in the beginning of this opinion.

It does not even appear that hitherto the Mayor and Aldermen of either city have done, in that capacity, any act indicating that they will not obey the testator's will.

Nor does it appear that they have made judicially or extra-judicially any demand to be discharged from any conditions, charges or modes of execution.

Our sixth resolution does not contemplate the case of an attempt on the part of the Cities (or one of them), through the instrumentality of their administrators, by means of a judicial or extra-judicial demand or otherwise, to get rid of a condition, charge or mode impossible or contrary to the laws or to good morals: for we have always answered that the condition, mode and charge disappeared entirely, in fact, never existed, and that nothing could work the loss of the legacy, on account of there having been a legitimate refusal to execute a condition, charge or mode, which would have vanished before the power of the law. The resolution just spoken of relates solely to the case (a case of which the undersigned are, in fact, wholly ignorant, but whose existence they are bound to suppose, in order that all states of the question may have been foreseen in their opinion,) of the Mayor and Aldermen, in those capacities and in the exercise of their functions, having manifested, by municipal resolves or ordinances, by judicial demands or otherwise, the desire of being freed from certain clauses, charges and conditions, because they considered them as impossible or contrary to the law, to good morals and to public policy, though the notion of the Mayor and Aldermen should be erroneous, and though what they held illegal was perfectly legal in itself, and finally, though what they deemed impossible was nevertheless possible, although difficult of execution.

Now, in this case, the undersigned have said in their sixth resolution, that such an act on the part of the administrators (Mayors and Aldermen) of a city, would not, of itself, bring about a loss of the legacy to the cities, nor a translation of the legacy to the use of the States.

For this there are two reasons equally powerful.

The first, is that the question whether an act ordered to be done is possible and legal, is often a nice and delicate question, respecting which there can be

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error with good faith. A nearly imperceptible shade separates the possible from the impossible; so it is with the legal and the illegal. In a variety of cases there is not the slightest doubt; but there are also circumstances in which what is not possible appears to be so, where what appears to violate no law is yet forbidden. In this debateable land, where physical or moral possibilities or impossibilities are found side by side, shall a legacy be forfeited because a legatee has asked to be discharged from a condition which he considers, improperly no doubt, but through error and with an appearance of reason, as impossible or contrary to the laws or to public policy? No. Forfeitures and penalties are not to be inflicted lightly. If the legatee has not acted in a spirit of contumaciousness and rebellion against the testator's will; if he had plausible, though insufficient reasons, for considering the clause as impossible or illegal, equity will not consider his seeking to be discharged from the clause as a positive refusal to perform it; a court of judicature will not ignore the secret motives that actuate men, and will not punish them before they have morally deserved the penalty. It will decree the legatee to perform the doubtful clause; it will burden him with the costs of suit as an amercement of his imprudence or his mistake. If the legatee has a competitor, a court will perhaps allow the original legatee a delay, during which he will be bound to begin the performance which he neglected through error, after which delay the second legatee would prevail; but that is all it would do for the present. It would not think itself bound to decree a forfeiture, a translation of the legacy. It will only be on the refusal to execute the judgment that a court will decree the revocation or translation of the gift.

For the penalties and clauses of revocation, attached to testamentary gifts, must be distinguished from the penalties and forfeitures imposed by contracts. The latter are the work of the contracting parties, and the result of the *aggregation*. In such case there is hardly anything to do, but to ascertain the fact of non-performance in order to give judgment for the other party; and still even then, the laws often allow the courts to inquire into the good faith of the delinquent, to examine whether the obligor is *in mora*, and to grant delays. (See arts. 1927 and 2042 of the Louisiana Code.)

But as for testamentary dispositions, the author is no longer present to interpret his work. From the very fact that he has conferred a benefit on the original legatee, he is presumed to have been unwilling that the courts should revoke it for a doubt, for an error, for a false notion of the legatee. This respect for the principal intention of the deceased is a powerful reason for not decreeing a forfeiture, before a court has shown the doubts be unfounded, by ordering the performance of the clauses.

The second reason is still more powerful. Hitherto we have supposed the mistake as to the nature of the clauses and conditions to be that of the legatee himself. In this section of our opinion, we suppose, not the instituted cities themselves, but the administrators of the cities, their Mayors and Aldermen, or municipal councils, to have misapprehended the nature of the conditions, and to have unfoundedly sued to be discharged from them. Now, if this hypothesis had become, or at a later day became, a reality, the undersigned are of opinion that it would be contrary to equity, and even contrary to the testator's intention, to decree a forfeiture or translation of legacy because the Mayors and Aldermen (*who are nothing more than administrators*) had fallen into a mistake respecting the meaning and validity of the clauses and conditions.

This would be punishing the instituted cities for the mistake of their administrators. It would be forgetting that the administrators of cities cannot alienate the property of cities but in cases where they are expressly empowered to that effect; that whatever an administrator does is always taken and interpreted in an administrative sense, and that a suit by an administrator to be released from certain conditions, cannot be an occasion of damage to the city or corporation subject to his administration.

§ VII.

OF THE CLAUSE: "AND SHOULD THE MAYOR, &c."

At any rate, THE UNDERSIGNED are of opinion that the cities are not within any case of revocation, because the testator has only provided for one, "the combining together of the two cities, and their knowingly and willfully violating

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any of the conditions directed for the management of the General Estate, and the application of the revenue arising therefrom."

On examining this clause of the will, we cannot avoid falling back on the general principles which have been expounded above. If those conditions are impossible, if they are contrary to the laws, if they put public policy in jeopardy, it does not become the testator to punish the cities because neither of them, nor the administrators of either, are willing to abide by what is illegal or impossible in those conditions.

But, in the contrary case, and supposing the Mayor and Aldermen to be in error respecting the alleged nullity of the conditions, where would be "the combining together and violating?"

Because each city is placed in the same situation, because the States attack them both, because they are both forced to defend themselves, and that by the same arguments, against the claim of the State, will it be thence concluded that they combine together for the purpose of violating the testator's conditions? Evidently not.

They certainly would have a right to combine against aggression. And more than that, they have a right to examine, even combinedly, what conditions are legally possible, what conditions are legally or physically impossible. So long as the cities examine these questions in a spirit of candor, and with the intention of bowing to the decrees of the Courts on the doubtful points, they cannot be charged with such an improper combination as would avoid the legacies.

§ VIII.

OF THE PRETENDED LAPSE.

In another part of the will it is said, that if one of the legacies left to either of the cities *lapsed*, the legacy must go to the State to which the city belongs.

Now, what is a lapsed disposition, or one that is *caduque*? It is one which, valid in itself and not having been revoked, yet, by an accidental cause, produces no effect.

It is evident that there can only be a lapse in the cases provided for by law. The French law has specified the causes of lapse: the case of the legatee's death before the testator, [article 1039,] or before the accomplishment of the suspensive condition on which the existence of the legacy depends, [article 1040,] the incapacity of the legatee, at the time of the opening of the right, [article 1043,] the loss of the thing bequeathed, [article 1042,] the refusal of the legatee to receive the thing bequeathed, [articles 898, 1043.] We do not know of any other case.

Such is the law, as it results from articles 1690, 1691, 1698, 1696 of the Louisiana Code, which in its article 1698, adds a new case of lapse, the birth of a child after the date of the will.

What have all these causes of lapse to do with the present controversy? There is only one which would be applicable, the case of one of the cities refusing its legacy. Now, both wish to enjoy their legacies.

Will the States say that the word *lapse* may also be understood of cases of revocation? We do not think so. *Lapse* is used in English as *caducité* is in French, in cases where the legacy has never vested in the person of the legatee. But, should a different meaning be given to the word *lapse*, it would be merely mooted anew the questions already treated of, since the whole of this argument goes to prove that the cities do not come within any case of revocation.

§ IX.

WHETHER THERE ARE REALLY ILLEGAL OR IMPOSSIBLE CLAUSES, CHARGES, MODES OR CONDITIONS IN McDONOGH'S WILL.

The undersigned have already said that, at the first blush, this question does not appear absolutely necessary in the controversy as raised by the States against the cities.

How stands the case? The States are plaintiffs; and the cities offer to execute the conditions, if they are possible and legal.

As the cities cannot be compelled, even by a threat of revocation, to execute what is reputed not written in a will, the cause is confined to the dilemma already put.

However, it is obvious how useful at a future day may be the consideration of this question which covers so wide a field, and all the branches of which we do not profess to solve. We are not initiated in the public law of the United States. There are even matters of fact of which we are ignorant, for instance, the value of the property of the deceased, and its annual revenue.

We have said that *John McDonogh*, in the conditions imposed on his property, has exceeded the powers granted by law to testators, and that consequently several of his conditions are null or may become so by their exaggerated character.

Thus, testamentary executors can be appointed; according to the law of Louisiana, they may have the seizin of the movables and immovables, and sell them even, if necessary, to pay the legacies; they have power to receive what is due the succession, and to administer fully on the estate.

But are they clothed with the power of converting personal estate into real estate? of purchasing lands and houses, as if they were the owners of the moneys? To do these things would be outstepping the law. The universal legatees alone are owners; the testator can undoubtedly charge them to make an investment in real estate with the moneys which he leaves them; he can empower his executors to superintend the investment; but he has no right to order his testamentary executors to purchase at their will, because they are not the owners of the moneys to be invested.

Can a testator who deems himself not rich enough, with what he has acquired during his life time, to establish the charities which his benevolence has projected, validly order his testamentary executors and his legatees under a universal title or a particular title, not only to invest, at his death, his personal estate in realty, but also to make the moneys and revenues productive, to put them out, and call them in; to watch the proper opportunities for purchasing real property at a cheap rate; to lend on mortgage, to let the property on advantageous terms, but for short periods, so that the improvements shall be clear gain, afterwards to let at higher rents; in fine, to administer the fortune he leaves, so as to increase it more and more, and heap it up till his succession shall have become as wealthy as he himself would have wished to be to fulfill his benevolent views.

In our opinion, such conditions are contrary to the nature of things, to public policy, and, in a certain degree, to good morals, especially when legacies of this nature are left to cities, whose administration ought to tend to the welfare of their inhabitants.

Man, at his death, transmits the ownership of his property to legatees and heirs; he exercises a last act of volition over his worldly estate by disposing of the ownership. But can he, without violating the rules of public policy, extend his volition over the mode of managing his estate? Shall he be able to acquire after his death? Can he order that his testamentary heir shall accumulate during a long period of years? His last will can only affect the estate which he leaves, the wealth with which God has blessed his labor, and not the property which will be acquired with the profits. The sovereignty of his volition cannot extend from beyond the grave over the habitual and every day management of the property which he leaves to his legatees.

Besides, what would be the consequence to the citizens of New Orleans and of Baltimore? (the former as the town property, the latter as the country property) Why, that an enormous proportion of houses to be let in the city (and of lands to be leased in the vicinity of the city)—for it is there that the testator orders all purchases to be made, both with his personal estate and with the product of the annuities—would belong to the city. The city corporation would, therefore, have the monopoly of letting tenements, and, agreeably to the testator's intentions, the city would let them at the highest possible rent. In New Orleans, the number of house owners would diminish as the city increased its purchases.

What would be the consequence of this to the city corporation? Why, it would be bound to administer after the mode pointed out by the will; it could never lease out property on long leases, as is often required for commercial establishments and manufactories; instead of giving aid and protection to the

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citizens, the city corporation would think itself bound to remain within the letter of the will, and to raise the rents; at the same time other owners of houses would also raise their rents; citizens who are obliged to live in hired houses, would be laden with heavy burthens, whilst the property of the Free Schools and of the Asylum for the Poor would increase.

Another condition, which appears to us equally contrary to public policy, is that the property left to the cities must be administered by others than the administrators of the cities themselves. The cities are corporations constituted, each according to its municipal laws and regulations: it is according to these regulations that each appoints its Mayor, Aldermen and City Councils. The good order of the community requires that neither city should be burthened with a double administration, nor with useless employees and expenses; and the law which gives testators the power of disposing of their property, does not bestow on them the right of creating, for the cities, a special mode of administration in regard to the property of his succession, and perpetual commissionerships, though delegated by the cities. For, in such a case, it is no longer a law which the testator makes respecting his property, it is a law on the management and mode of administration, in contradiction to the mode of administration existing for the cities, which changes according to time and place. It is agreeable to law to dispose of the ownership of property forever, by testamentary disposition; it is contrary to law to regulate forever the administration of the property bequeathed, because the testator has the ownership *in bonis*, but not so the future administration.

Is it contrary to the laws that a testator should order the inalienability of the property which he gives to the cities, even of the property acquired by the investment of the personalty in realty, or by the capitalizing of the revenues?

The principle is that it belongs to the legislature of each country to decide whether the patrimonial property of the cities and corporations ought to be alienable or not. It is the public interest which, in the various emergencies, dictates the laws. This public interest varies according to time and place. The testator can therefore forbid alienation; it is the province of the legislature, or of the courts, according to their respective powers, to apply a remedy to the effects of the donation. In France, corporations cannot alienate, unless a law allows them; but in France, also, there has been a series of edicts and of laws which have forbidden them to acquire real estate. There have ever been laws which have stripped them of the real estate they had. None of these laws concern us at present. The only certain guide for the legislature is the public interest, and this sacred interest is not always soundly appreciated.

In other countries as well as France, it is possible that the public interest should be seriously jeopardized if a corporation should become the owner of a considerable portion of the territory, and that the love of country itself should be diminished by the necessity of having a dwelling place by precarious title only. A legislative prohibition which would thwart *McDonogh's* will on this point, would only be an impossibility of execution in the way of a mode annexed to the gift; and if, in the present controversy, the motives expounded above are sufficient to show the dangers attending such a mass of property in the hands of corporations, it would not be easy to understand why the cities should not have the right of examining this point in a spirit of candor and good faith.

Considered at Paris, December 18, 1851.

COIN-DELISLE, *Advocate,*
Late of the Council of the Order of Advocates of Paris.

DELANGLE,
Late Bastonier of the Order of Advocates of Paris.

GIRAUD, L. L. D.,
A member of the National Institute.

DURANTON, PERE,
Advocate, Professor in the Law Faculty of Paris.

MARCADE, *Advocate,*
Late Advocate in the Court of Cassation.

EUSTIS, C. J. (DUNBAR, J., concurring.) This appeal is taken by the State of Louisiana and the State of Maryland from judgments of the Court of the Fifth District of New Orleans. The judgment from which the State of Louisiana has appealed, is general in favor of the defendants, for the reason that the State of Louisiana is not entitled to take, under the will of the late John McDonogh, the half of his estate, in the place and stead of the City of New Orleans.

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The judgment from which the State of Maryland has appealed, dismisses the petition of intervention filed by that State, for the reasons given for the decision of the Court, as between the State of Louisiana and the defendants. The State of Maryland claimed the legacy in favor of the City of Baltimore, on the same grounds that the State of Louisiana claimed that in favor of the City of New Orleans, and in its petition of intervention prayed for a citation against the City of Baltimore, to answer and plead to their petition through *Thomas J. Durant, Esq.*, the Attorney appointed to represent the absent heirs in the mortuary proceedings. The citation and petition having been served on him accordingly, he filed an exception that he had no authority to represent the City of Baltimore by virtue of his appointment of Attorney of absent heirs, and was not bound to answer the petition, and on this he prayed the judgment of the Court. The exception thus taken was, after argument of counsel, sustained by the Court, and the said Attorney of absent heirs dismissed from the suit.

The City of Baltimore is not in Court under these proceedings through the medium of the Attorney of absent heirs. I find no appearance entered for this party, nor any authority to make the City a party to this suit.

The dismissal of the petition of intervention, there being no antagonist interest represented on the record, was a just consequence of the decision on the exception. According to my judgment, neither the State of Maryland nor the City of Baltimore is in Court, and we have no power to adjudicate upon the rights of either.

The grounds of this opinion may or may not be applicable to the legacy in favor of the Colonization Society. That institution is not a party to this suit. I am not advised that the State would undertake to defeat this legacy, alone and separated from the residuary bequest to the City of New Orleans, and I desire to be considered as expressing no opinion whatever in relation to it. The subject has not been fully treated in argument, and ought not to be acted upon except under the most deliberate examination.

The construction of the will, in relation to the titles created by it, is exclusively a question of law. From a very considerate perusal of it, from a scrutiny of every part of it, and in viewing its character as a whole, I have been able to come to no other conclusion than that contended for by the counsel for the defendants, viz: that it conveys the title or ownership of the property embraced by the legacies to the residuary legatees—the Cities of New Orleans and of Baltimore. The words of the will on this subject are:

"I give, will and bequeath all the rest, residue and remainder of my estate, real and personal, present and future, as well that which is now mine as that which may be acquired by me hereafter, at any time previous to my death, and of which I may die possessed, of whatsoever nature it may be, and wheresoever situate, subject to the payment of the several annuities or sums of money hereafter directed and set forth, which said annuities or sums of money are to be paid by the *devisees* of this, my general estate, out of the rents of the said

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estate, unto the Mayor, Aldermen and inhabitants of New Orleans, and the Mayor, Aldermen and inhabitants of Baltimore, my native City, in the State of Maryland, and their successors, in equal proportions of one-half to each of the said Cities of New Orleans and Baltimore, forever, to and for the several interests and purposes hereinafter mentioned, declared and set forth, concerning the same, especially for the establishment and support of free schools, &c."

There is some confusion in the will, which is confined to the administration, however, and in no respect affects the title created in the residuary legatees. The other parts of the will contain the same words used in the portion just cited—"willed and bequeathed"—and the title of the cities is used in no other sense throughout the whole instrument.

The prohibitions of the will seem to be in affirmance of the titles of the legatees. The prohibition to alienate, to compromise, the annuities, the charges on the legacies, the penalty, the provision for the lapse, in my judgment all concur, and none of them conflict with the hypothesis of the title being vested in the legatees.

Municipal corporations are expressly authorized to receive legacies by the Louisiana Code; their capacity in this respect is recognized by Article 423, and by the whole course of legislation on this subject.

My conclusion is, therefore, in favor of the position of the counsel for the defendants, that the City of New Orleans is a residuary legatee under an universal title.

This legacy clearly belongs to a class known to the civil law from the foundation of Christianity, by the name of legacies to pious uses. They are an element in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization.

Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies. Domat, lib. 4, tit. 2, section 6, § 2.

The term pious uses includes not only the encouragement and support of pious and charitable institutions, but those in aid of education and the advancement of science and the arts. Makelday on the Roman law, § 145.

They are viewed with special favor by the law: *ils sont considérés comme privilèges dans l'esprit des lois*, and with double favor on account of their motives for sacred usages and their advantage to the public weal. Domat loc. cit.

The great consideration which the law attaches to these legacies, controls tribunals in the interpretation of them, and has secured for their support a doctrine of approximation which is coeval with their existence.

That without a positive prohibition municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education and charity, seems to me repugnant to all sound ideas of policy, and to the reason of the law.

What legacies could they be expected to receive except for some public or humane object? Who would give a city a legacy, to be absorbed by its debts or appropriated to common expenses? Certainly, so far as the conscience of the public is concerned, a legacy of money to a city, without any designation, would be held to have been given for some object of charity or beneficence.

I think there are Articles in the Code which exclude the conclusion as to the incapacity of the City of New Orleans to take legacies of this kind.

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The Article 1536 provides that donations for the benefit of a hospital of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments.

Provision is made by this Article to give effect to donations for the poor made by living persons—*inter vivos*—because in donations of this kind the donor is not bound, and the donation is without effect until the act of donation is signed and accepted by a party competent to receive the donation. The Article relates to the form of the act, and provides for its acceptance and the completion of the donation, and is not its legality pre-supposed? Is it not predicated upon the legality of this mode of property for pious uses? Such appears to me to be the obvious intendment of the Article. There is not the slightest ground for any distinction as to the legality of the holding or ownership by donation—*inter vivos* and *mortis causa*—that is, that the property could be acquired by one donation and not by the other.

Nor does the law make any distinction between a legacy to the poor of a city and a legacy to a city for the poor. In both cases it is a legacy to pious uses, and the city is the recipient. Domat lib. 4, tit. 2, sec. 2, § 18; id. sec. 6, § 1 et seq.

The article 1548 provides that when the donation is made to minors, to persons under interdiction, or to public establishments, the registry shall be made at the instance of curators, tutors or administrators.

The Article 607 provides that the usufruct granted to corporations, congregations and other companies which are deemed perpetual, lasts only thirty years. If these corporations, congregations and companies are suppressed, abolished, or terminate in any other manner, the usufruct ceases and becomes united with the ownership.

The legislation concerning the powers of the City of New Orleans, I think is in the same sense.

Doubts having existed as to the power of the City to hold property out of its limits, the corporation was declared capable of holding or possessing real estate without its limits, and of acquiring, retaining or possessing by donation or legacy any property, real or personal, whether situate within or without the limits of the City. Act of 1840, p. 50. Digest of Statutes, 144, § 150.

I have no doubt of the legality of the testamentary disposition under consideration. I think it would follow as a necessary consequence from the definition, origin and nature of legacies to pious uses that those in favor of the Cities are of that sort; those in favor of the States, in the contingency provided, are of the same character. The difference is that in the former the mode of administration is regulated by the will; in the latter it is left to the wisdom and discretion of the legislative power.

The administration of property, devoted to pious uses by a legacy, through the instrumentality of overseers, commissioners or a quasi corporation, makes no difference as to the title; both, in fact, are legacies to pious uses, and not unlike the *Girard* legacy, maintained by this Court in 2d Annual Reports, 898. *Girard heirs v. New Orleans*.

The objections to the validity of these bequests may be reduced to three heads, which I will now proceed to consider separately, and in the order they are presented.

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It is said they are void, because of the uncertainty of the recipients of the charity; because the estate created is a trust or *fidei commissum*, and therefore prohibited, and because the conditions of the bequest being impossible, and against public policy, the contingency provided for by the will has occurred, and the intention of the testator must be carried into effect, and that intention will be entirely defeated unless the States are to take the legacies as provided by the will.

I. From what has preceded it is plain that under the civil law it is no objection to the validity of a legacy to pious uses, that it is for the benefit of the poor even without any designation of locality. There is no principle better settled than that such legacies are valid. I met with a case in the course of my examination of this subject in which a will was maintained in which a testator instituted the poor his heirs. Indeed, the very generality complained of is an illustration of Christian charity; and uncertainty of individual object at the time of the gift is its characteristic and element.

In the language of the Partidas, "when the testator declares I institute for my heirs the poor of such a city or town, or I order that my estate shall be given to the poor for the good of my soul, as doubts may arise who the poor are, we will explain ourselves in this respect. And we say that it ought to be given and distributed among the poor in the hospitals of the city or town designated by the testator, and especially to those who are afflicted with such infirmities as to be unable to leave the hospitals to seek for alms, as the maimed, the lame, the blind, the foundlings, who are reared there, and the aged, or those who are affected with such infirmities as to prevent them from walking and going out of the hospitals, as they are more in want of assistance than those who can ask for alms. And if the testator had not designated the city or town, to the poor of which he intended to give his estate, then it shall be divided among the poor of the place where he makes his will." Partidas 6, 3, 20. By the general beneficence to the poor, without distinction—*istis fecundior pietas est*—the greater the merit in the donor, as the charity is the more comprehensive and catholic.

So the bequest of a sum of money "to the orphans of the First Municipality of New Orleans," was recovered by the Council of that Municipality under the Article 1536. This was a donation *causa mortis*, indefinite and comprehensive in its terms, making no distinction among the beneficiaries either as to age, sex or religion, and was maintained as valid by the Supreme Court of this State. *Succession of Mary*, 2d Robinson's Reports, 438.

II. Before considering the second objection to the validity of these legacies, because they create trust estates or *fidei commissum*, a few observations seem to be required as to the decision rendered by this Court on the will of the late Isaac Franklin.

I do not think that what was decided or said in that case has any application to this. I so expressly stated in the separate opinion which I delivered in that case. I undertook to give my reasons for deciding that the prohibition in the Code of substitutions and *fidei commissum* intended trust estates. I showed that these words *trusts* and *fidei commissum* were used as of the same sense by *Kent* and *Blackstone*, and that the Supreme Courts of the United States, and of this State, had both held the prohibition of *fidei commissum* to include trusts. That they are not the same thing every one knows. The English trust estate had no place in the Roman law, and its resemblance to the *fidei commissum* is remote.

But that in the common language of jurisprudence the word trust is used to express the *fidei commissum* is most certain. *Gibbon* so uses it. *Dr. Cooper*, an accomplished jurist and scholar, so uses it in his translation of the Institutes. *Dr. Broune*, in his treatise on the civil law, so uses it, and it is used in that sense in *Wood's Institutes*.

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But whether the trust estate was or was not included in the prohibition is a matter of no moment in the present case. We have always held the trust estate to be an impossible estate, that the two coterminously existing estates had no place in our laws, and that we could recognize no right of property in real estate, no tenure, no holding, no title, in relation to it, which the Code did not recognize.

Franklin gave by his will a legacy of a large portion of his lands and slaves in Louisiana to his brothers, residing in Sumner county, in the State of Tennessee, in trust, for the foundation and support of a seminary of education in that county. The title thus attempted to be created in the property was held to have no effect as a conveyance of it. The testator undertook to establish a trust estate in the technical sense of the English law. The title was held to be impossible between the parties, and to be prohibited by law.

Judge Preston thought the legacy was one to pious uses, and that the title created by the will was therefore valid. He supported his views by a very elaborate argument, but they were not concurred in by a majority of the Court.

Legacies for pious uses, I considered, were authorized by law for the purpose of procuring aid from individuals in supplying those wants which the State itself, or the communities into which it is divided, were bound to provide for in the interest of society, and as a function of government; that in their objects they were local and limited to the jurisdiction of the State, being for the support and education of the poor, and for purposes which fall within the circle of the duties of government; that the Articles of the Code recognized legacies to pious uses for these objects, and none others, and that there was no warrant of law for a title in real estate in trust in Louisiana to be held for the exclusive benefit of a foreign corporation. I thought that this diversion and holding of property from private uses and ownership, with all the privileges and favor the law can bestow, was exclusively in the interest of the public weal. The privileges and favor with which these legacies are maintained and carried into effect—the doctrine of *cy pres* would all be inapplicable when attempted to be applied for the benefit of persons beyond our jurisdiction—the reason of all these would fail in such an application, it being the obligation of every State to provide for the wants of its own inhabitants in this respect.

But the answer to this second objection is, that if the residuary legacies do create trusts or *fidei commissum*, they are, with numerous other testamentary trusts necessary in the execution of a will, saved from the general prohibition by the provisions of the Code itself. It is to be observed that I use the words trusts and *fidei commissum* in their most general sense. Vide §83, tit. 2, 16 and 17.

III. It is urged that the testator never intended the Cities to take his property, unless his directions were to be observed, and if the Cities could not and did not carry into effect his directions, in that event his will was that his property should go to the States.

I believe I am only following in the uniform current of opinion in the civil law writers, and in the decisions of the Court of Cassation, in treating the directions contained in this will, concerning the property and its administration, as

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modes, charges or conditions. There is one mode or condition, and it is that on which the District Judge has decided the case, the utter impossibility of the compliance with which cannot be contested. It is that prohibiting the partition of the lands bequeathed to the Cities of New Orleans and Baltimore, and requiring their joint ownership to continue forever. The same may be said of the supervision and check which the testator attempts to organize of one corporation over the other, through the instrumentality of commissions. In these respects it is clearly impossible under our laws to carry into effect the intention of the testator. The condition is impossible, and there are others equally so in the will which it is not necessary particularly to note.

Our inquiry is to be directed to the effect which the law gives to impossible conditions in testamentary dispositions. At the commencement of the inquiry we are met by this dilemma on the part of the defence. If the conditions, modes, or charges imposed on the legatees by the will are legal and possible, we will execute them; if they are not legal or possible, as the plaintiffs insist they are, then and in that case they form no part of the will. By the Article 1506 of the Code, every impossible condition, or condition contrary to the laws and to good morals, is reputed not written in a will, and the property remains to the legatees free from the incumbrance of the impossible condition, mode or charge.

This Article is not in the ordinary form of a prohibitive law. It is the first of the chapter which treats "of dispositions *reprobated* by law in donations *inter vivos* and *causa mortis*." The expression *reprobated*—*reprovoqués*—by the law implies something even more than prohibition. The terms made use of are plain, general and comprehensive, excluding all exception, direct, positive and unambiguous, the whole tenor imperatively establishing the law having for its object the exclusion of the possibility of the legal existence of this class of conditions in testaments.

Concede that to give effect to this Article is to defeat the intention of the testator, and by reading the will without the impossible or illegal condition, the intention of the testator is sacrificed. But if the law so ordains it that a rule established in the interest of order and sound policy, shall be the paramount consideration in giving effect to the wills of men disposing of their property after their death, who can gainsay it?

That this consequence of defeating the intention of the testator is recognized as following the same legislation on the same subject in the Code Napoleon, is abundantly shown. The authority of *Merlin* is conclusive on this point. Code Napoleon, 900. *Merlin*, Repertoire, verbo *condition*, sec. 2, § 4.

The effect of this rule is to maintain the purpose and intention of the law, notwithstanding the intention of the testator, who has undertaken to regulate his property after his death, in a manner which the law reprobates and declares its ministers shall not execute.

The Article 1705 of the Code, which provides that in the interpretation of acts of last will the intention of the testator must principally be endeavored to be ascertained, is in its very terms a rule of interpretation of wills valid in all the requisites and forms of law, and having no radical defect as conveyances of property, and is clearly subordinate to the prohibition of the Article 1506, standing under the significant head of "dispositions reprobated by law." In my judgment, the intention of the testator might, with the same propriety, be invoked in the interpretation of a will not having the requisite number of witnesses, or deficient in some necessary form, as in aid of the dispositions of this

will in favor of the States. It is equally clear to my mind that the impossible or illegal condition cannot be read for the purpose of ascertaining the intention of the testator in order to give it effect. The law, in saying it shall be reputed as not written, has said it shall not be read for any purpose except for that of utter exclusion from the testament.

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The right of a man to dispose of his property after his death is derived exclusively from the law, and if the law says that in certain cases, from motives of policy, the vain conceits of testators—*ineptæ voluntatis*—shall be held not written, in the administration of justice by its ministers how can this command be disobeyed?

I find no reason for disobeying it, in the opinion of learned jurists, who are of opinion that such an Article ought not to have been introduced into a Code. It has been, after the most mature deliberation, introduced into the Napoleon Code, and adopted in ours. I think I see great and comprehensive foresight in thus exterminating triviality from jurisprudence, and putting an end to the endless controversies which it engenders. The principle of the rule has its foundation in a very high consideration of law as a science, which ought not to be conversant with anything impossible, nor be applied to any thing illegal or immoral, except for purposes of prevention or punishment. Its ministers ought not to be employed in seeking to carry into effect the whims and fancies of dying men, in which society has no interest, useless in themselves and utterly beneath its dignity as a system of enlightened reason and policy.

The history of this subject is given correctly in the printed argument of the learned counsel for the defendant, and in the *mémoire* prepared by several of the most eminent jurists of France.

It is shown that the same principle with regard to the impossible or illegal condition prevailed in the Roman law, in the ancient jurisprudence of France, and under the law of Spain. As a general rule it was adopted and still prevails in the English law. But there were a number of exceptions established by the civilians to the operation of the principle, which gave rise to subtle, difficult and intricate questions. Vide Swinburne on Testaments, part 4, section 6, and the works referred to by this author.

The Article 900 of the Napoleon Code, which corresponds with our Article 1506, was adopted without any discussion in the deliberations which preceded the formation of that Code. Its object unquestionably was to cut off, as far as possible, all exceptions to the general rule, to extinguish all controversy about useless things, to free the science of the law from all communion with that which involved no matter of right, and which it was the public interest to suppress.

So vast and comprehensive is this science that even to this rule there was a necessity for certain exceptions to meet the exigencies of other principles established by the Code. These few cases are all expressly provided for, which fact re-asserts the paramount authority of the rule in all other cases.

The general idea of property under the Roman law, and under our system, is that of simple, uniform and absolute dominion. The subordinate exceptions of use, usufruct and servitudes are abundantly sufficient to meet all the wants of civilization, and there is no warrant of law, no reason of policy, for the introduction of any other.

In conclusion, I think the dilemma presented by the defendants stands unre-moved and unanswered. If the conditions of the will are lawful and possible,

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the legatees avow themselves ready to fulfill them; if they are neither one nor the other, the law holds them to be not written.

My opinion is that the judgment of the District Court ought to be affirmed.

It is considered by the Court for the reasons given in writing in the opinions of the Judges, that the judgment appealed from be affirmed, and on the intervention of the State of Maryland, it is considered by the Court for the reasons given in the opinion of the Chief Justice, that the judgment appealed from be affirmed, without prejudice, the State of Maryland paying costs in both Courts.

ROST, J. I concur in opinion with the Chief Justice, that the claim of the State of Maryland cannot, in the present state of the record, be acted upon, and that the judgment, dismissing the petition of intervention filed in its behalf, should be affirmed. I have nothing to add to the reasons adduced by him.

The main difficulty in arriving at correct conclusions upon an instrument so obscure and perplexing as the will under consideration, is to ascertain which rules of interpretation are applicable to the apparently conflicting dispositions it contains: and at the threshold of that inquiry it is proper to premise that the rules of interpretation, found in the Code, belong to the doctrinal part of the law; that their enactment by the Legislature is not restrictive of the rules for the interpretation of contracts and testaments found in the body of the Civil law: that all alike are advices given to the Judge, landmarks they might be called, taking effect to the cases to which they apply, not so much *ratione imperii* as *imperio rationis*, and that while it is his duty not to lose sight of any of them, he must in every case exercise his discretion in applying them, ever bearing in mind that the least circumstance is at times sufficient to prevent their application. *Simul ac in aliquo vitata est, perdit officium suum.* Leg. 1 ff. *de reg. jur.*

The true meaning of those rules and their relative force and effect, present some of the most embarrassing questions in jurisprudence, and the correct application of each to the class of cases for which it was intended, is an unerring test of judicial ability. 6 Toullier, No. 333.

Before examining the respective claims of the parties to this litigation who are properly before us, it is well to ascertain whether there is in the heirs at law of the deceased an outstanding title to his succession. For if, upon examination, such a title should be ascertained to exist, a decision in favor of either party would be vain and useless.

The heirs at law of the testator are not before us. They have elected to exercise their legal rights in the Federal Courts, where their claim to the succession of their relative is now pending. Their counsel in that suit, who were also of counsel in the case of *Acklen v. Franklin's ex'ors*, alluded to by the Chief Justice in his opinion, submitted to us, as part of their argument, the brief prepared by them. In that brief the following statements are found:

"McDonogh looked upon his legal heirs as his enemies, because the law assigns them as the successors of his wealth."

"The Counsel for the defence labors with a *bonhomie* worthy of all commendation, to show that the testator meant to exclude, *at all events*, his heirs at law. The pains taken to prove this are superfluous; it is admitted, without hesitation, the testator certainly intended to exclude his heirs at law for ever, and they do not claim one cent under the will, or the intention of the testator; he

had the right to disinherit them if he devoted his property to some legal purpose, but if he has devoted his property to illegal purposes, his will is void, and the estate falls to them by the legal order of succession. They claim not under the will, but against it.

"They do not seek to show that they, whom the testator has so ruthlessly disinherited, were in any possible event to be the objects of his beneficence."

This is all true and manifestly results from the bequest by the testator of a mere pittance to his favorite sister and her children; from his omission to provide for his other numerous relatives, and especially from his declaration that if he had children, he would bequeath a very small amount to them merely sufficient to excite them to habits of industry and frugality, and no more; thus intimating that he would violate the law which secures to children a *légitime* in their father's estate. But I am unable to perceive how, upon legal grounds, his admitted insensibility to the ties of kindred can benefit relatives claiming his succession. It necessarily makes against them, and is one of those circumstances calculated to prevent the application of rules of interpretation which they might perhaps invoke if he had abundantly provided for them, and it could be inferred from the will that, under certain contingencies, he preferred them to the States of Louisiana and Maryland. It is to such a case that the rules "*in testamentis, plenius voluntates testantium interpretantur*," and "*optimum ergo esse, Pedius ait, non propriam verborum significationem scrutari, sed in primis quid testator demonstrare voluerit*," particularly apply. D. 50, 17, 12; D. 38, 7, 18.

The intention of the testator to exclude his heirs at law, at all events, being admitted, the conclusion is inevitable that if the cities could not take the legacies or violated the conditions which the testator had the right to impose, he intended to vest his succession in the States of Louisiana and Maryland. And if, in the language of *Judge Story*, the lawful intention of the testator is the polestar to guide Courts in the exposition of his will, or if, as *Coin-Delisle* graphically expresses it, it is the trail which the Judge should follow in all its turns and windings, it must be the rule of our decision, unless this case comes under some arbitrary law which controls the will of the testator.

Considering, *in primis*, what the testator intended, it is too clear for argument that if the bequest to the cities did not take effect, or become forfeited by the violation on their part of lawful conditions, the States were to take it without conditions, as the next best thing he could do to insure the preservation of his fortune, and the application of it in his name to charitable uses.

It is said that the legal meaning of the word lapse does not cover a case of this kind, and that cases of lapsed legacies should not be extended by implication. The intention of the testator, and the sense in which he used the word lapse, being manifest, under the rules already cited, and the additional one, "*in conditionibus testamentorum voluntatem potius quam verba considerari oportet*," that sense should be preferred though not the most correct and usual. D. b. 35; C. 1, b. 101; *Coin-Delisle, Donations et Testaments*, page —.

If the will simply provided that the lapsed legacies shall enure to the States, it may be that the States could receive, under that disposition, only the title or interest first bestowed on the cities, and that in that case the thing bequeathed would not be altered in its nature or extent in passing from the first legatee to the second; but it will not be denied that the testator might have added that the legacies, so lapsed, should enure to the benefit of the States, free from some

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or all of the conditions imposed upon the first legatees. This I conceive he has done by requesting the Legislatures of those States to carry his intentions into effect as far and in the manner which will appear to them the most proper. No one reading the will can fail to see that when he says, "If the legacy to the Cities lapses, it shall inure to the benefit of the States." He means "the property composing it shall inure to the benefit of the States;" and it would be strange if Courts of Justice could not reach that meaning.

It is true that in the construction of wills Courts of Justice ought not to depart, without necessity, from the proper sense of the words used. That necessity seldom occurs in cases of single dispositions, unconnected with others the will may contain; but when the several dispositions in the will are constituent parts of one scheme, each must receive the sense which results from the entire instrument, and the rule relied on has, in that case, reference, not to the terms used in any one disposition, but to the entire contents of the will. In such a case, "if there is a just reason to believe that the testator has used terms in a sense different from that sanctioned by usage, they must be taken in the sense in which it is believed he understood them." 6 Toullier, No. 312; D, l. 24, *de reb. dub.*

"The intention of the testator must prevail over the grammatical meaning of the words which he has used, provided that his intention is ascertained, by dispositions contained and words used in the will, and it is manifest that he had another object and another thought than that which the terms used in a particular disposition would otherwise convey." 1 Nouveau Furgole, Nos. 507, 508; D. l. 7, § 2, *in fine de suppellectile leg.*

Under the authority cited from the Roman Digest, the interpretation should be more plenary in wills than in contracts; by which I understand that when the sense of a particular disposition resulting from the entire instrument has been ascertained, Courts may go further in cases of testaments than in cases of contracts, in disregarding the grammatical meaning of the terms used, so far indeed, as to supply words omitted, which may be done whenever the obvious meaning, and other parts of the will, restore those words naturally. Coin-De-lisle, p. 447, No. 9; D. l. 67, § 9, ff. *de legat*, 2d l. 10; C. *de fid.* l. 1, § ff. *de hared. inst.* l. 1; C. *de Test.*

The lapsed legacies, that is, the property composing them, was to inure to the States unconditionally, and the mode of execution of the will was left to the discretion of the Legislature. This disposition created precisely the title which the city of New Orleans claims under art. 1506 of the Code, and the answer of *Modestinus*, cited in argument, D. 6, 38. Such a disposition would unquestionably be valid if that in favor of the cities was not, and the claims of the heirs at law may safely be left out of view.

The disposition in favor of the city of New Orleans may be viewed as a bequest for pious uses—and the first question to be examined is, whether the holding of property for pious uses by this city is a tenure recognized by the law of Louisiana.

It is urged that the tenure, under which the city claims, is a technical trust of the English law, similar in all respects to those set aside by this Court, in the cases of *Harper v. Stansbrough* and *Acklin v. Franklin's executors*; that if it is not such a tenure, it is at least a tenure invented by the testator, without warrant of law to sustain it, and therefore void. It is further urged, that the disposition is otherwise void for the want of capacity in the city to take, and

by reason of the uncertainty of the beneficiaries and of their non-existence at the time of the opening of the succession.

Overlooking the inherent powers of Municipal Corporations, I thought, after the argument, that these grounds were tenable; but further consultation with my brethren, and a reference to authorities, to which, until lately, I had no access, have satisfied me that I was in error, and that under our system of jurisprudence, the capacity of the city of New Orleans to take and administer this charity is substantially the same as that claimed in this suit for the State of Louisiana.

The City was the original element of the Roman world; its organization was so complete, and so well adapted to the wants of civilized man, that after all other institutions perished, in the fall of the empire, the municipalities not only remained, but acquired additional importance, and through them the civilization of Rome impressed itself upon the institutions of its conquerors.

In no part of Europe, during the middle ages, was the importance of municipalities so great as in the country from which the civil law has descended to us. The *fueros* of the cities of Spain were constitutions rather than charters; they exercised under them most of the powers of sovereignty, and it is with truth that *Gregorio Lopez* says: *Villæ et castra sunt nomina quæ in se continent jurisdictionem, honorem et districtum et etiam jus patronatus*. No. 8, l. 9, t. 4, p. 5.

It is in accordance with the spirit of the legislation of that country that the successive constitutions of the State of Louisiana have made the city of New Orleans and its officers permanent functionaries of government, for all purposes of police and good order and for the punishment of minor crimes and offences, and that the Code has authorized it to accept donations made to the poor, and to take by will and by donations *inter vivos*.

It needs not the authority of *Domat*, at the present day, to prove that the police and good order of a city include the education of youth and the care of the poor within its limits. This is a truth which comes home to the bosoms of all men; deduced at first from the precepts of Christianity, it has become an elementary principle in the theory of our government. *Domat, Des Comm.* p. 107.

If, for want of other means, the city taxed itself for those purposes, that tax could not be diverted to other objects, or seized by the creditors of the city, *Egerton v. Municipality* No. 8, 1 Annual, 486. If a particular branch of the revenue was affected by law to that object, it would equally be free from seizure. But the revenues of a city are not all derived from taxation; the original act of incorporation of this city recognized that it had other means, and authorized the levying of taxes only to supply any deficiency in other branches of revenue. It being unquestionable that cities can hold property patrimonially, and that the property thus held may be applied by law to any object for which the city is bound to provide, what is there contrary to public policy or injurious to creditors in the enforcement of a condition appended to a bequest, and without which the bequest would not have been made, that the property given shall be applied to some of those objects and shall never be alienated? Nothing that I can see. The giving, on such a condition, is a reasonable liberty to bestow upon testators, and the bequest, by providing a fund which the city was otherwise bound to supply, enriches it, and increases its means to meet its obligations.

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As already stated, the law establishes the capacity of this city to take by will.

It also recognizes donations in favor of the poor, such as were made in the will of *Mary*, in 2d R. R. p. 440, and in that of *Mr. Henderson*, in 5th Annual, 441.

If the legacy, in this case, had been made directly to the poor and to the children of the poor, it would come within the letter of the law; the city would have taken charge of it, and administered it for the beneficiaries. I am satisfied, however, that this is not the only form such a disposition can assume, and that the bequest, as made, comes within the spirit and learning of our jurisprudence in the matter of charitable bequests.

“On peut léguer à une ville ou une communauté, quelle qu'elle soit, ecclésiastique ou laïque, et destiner le don à quelque usage licite et honnête, comme pour des ouvrages publics, pour la nourriture des pauvres, ou pour d'autres œuvres de piété, ou du bien public. Et il faut considérer comme un legs fait à une ville ou autre communauté, ce qui serait légué à ceux qui la composent, comme aux habitans d'une telle ville ou autre lieu.” Domat, Lois Civ. b. 3, tit. 2, § 2, p. 465; Law 17, *Du legs*, l. 1; C. law, 122; D. law 2d, *de reb. dub.*; D. law 20, *de reb. dub.*

Domat places donations to a city for pious uses, and those for the erection of works of public utility, on the same footing, and the laws which he cites clearly establish the truth of that proposition. He further lays down the rule that, in either case, the destination affixed to the property by the testator, follows it in the possession of the legatee, who is, notwithstanding, vested with the title.

It is hardly necessary to say that a donation of land to the city, within its limits, for the purpose of erecting works of public utility, has ever been held valid and binding towards all persons, so far as the conditions it imposed were lawful. In 1785, *Don Andres Almonaster* built an hospital on a tract of land which he owned, and gave the land and building to the city, with the charge to keep it up for ever as an hospital for lepers, so that the public might have the benefit of it in perpetuity.

In the succession of time the disease of leprosy disappeared from the country. The house ceased to be used as an hospital, and was finally destroyed by fire. In 1833 the city passed an ordinance converting the land into a cemetery, the heir of the grantor then brought suit to recover it by reason of the breach of the condition attached to the bequest. We held that the legacy being for a pious use, could not be revoked by the inexecution of the condition—but we recognized at the same time the principle that the destination given to the property might have been enforced so long as there were lepers entitled to be admitted to the hospital. *Pontalba v. The City of New Orleans*, 3d Ann. 660.

Within a few years past, and after the repeal of the Spanish laws, *Abijah Fisk* gave to this city a house and lot, on condition that it should be applied to the keeping of a public library, and to be used for no other purpose.

The residuary legatee contested the validity of this bequest, on the ground that the will in which it was contained had been revoked by a posterior will; but neither in this case, nor in that of *Pontalba*, was it alleged in the pleading or contended in argument, that the dispositions attacked created a tenure of property unknown to the law. The judgment creditors of the city have seized in succession the taxes of the city, its perpetual rents, and its interest in the water

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works; but it has never entered their minds that they could seize this house as the property of the corporation, and disregard the destination affixed to it by the testator. The right of the city to acquire property under a testamentary disposition with a specific destination to some work of public utility, such as the erection of a court-house, a jail, an hospital, a public library or lecture room, &c., admits of no doubt, and, as shown by *Domat*, its right to take and hold property, upon the same tenure for pious uses, rests upon the same principle. It may be said that the city is not bound to make provision in all the cases provided by the testator; this may be true, but the public schools and the asylum for the poor, are certainly things which the city is bound to provide; and they alone would be sufficient to sustain the disposition.

The ground that the bequest is void for uncertainty and for the non-existence of the beneficiaries at the time of the opening of the succession, can hardly be considered serious in any forum governed by the rules of the Civil law.

"*Quod pauperibus testamento vel codicillis relinquitur, non ut incertis personis relictum evaniscat, sed omnibus modis, ratum firmumque consistat*," is the rule on that subject in the Code of *Justinian*, which, so far as I am informed, has passed into the jurisprudence of all modern nations. An opinion of learned Counsel has been placed in our hands in support of the claim of the heirs at law of the testator, going to show that under the laws of Maryland bequests for the poor, or for their benefit, are void for uncertainty. It seems to have been so held by the Courts of that State, although it is probable that those decisions would not be followed, after the enabling statute, passed in 1842, by the legislature of Maryland. However this may be, I adopt fully the opinion of the Supreme Court of the United States in the cause of *Vidal v. the City of Philadelphia*, that the law was otherwise in England before the statute of Elizabeth, and I am very sure that it is otherwise here. See 2 Howard, p. 107.

Although, says *Ricard*, the great interpreter of the Roman law, on this subject—although the poor and the captive do not compose legal communities, and although they may pass for uncertain persons when not otherwise designated, nevertheless as their indigence has placed them under the protection of the public, whose duty it is to assist and sustain the weak, the laws have not only authorized donations and bequests to be made for their benefit collectively, but they have declared them the most favorable of all dispositions, and to avoid the inconvenience resulting from the uncertainty of the persons to whom the gift or legacy is to be distributed, it is customary to leave the distribution to the executors, or to the local authority. *Ricard, Donations*, p. 150.

I agree fully with the able counsel for the city of Philadelphia in the case of *Vidal*, that uncertainty seems to be of the essence of charitable bequests. Whenever the beneficiary is designated by name, he has a legal right which he can exercise, and his merit is alone to be considered; the bequest ceases to have the peculiar merit of a charity.

But it is urged, and it has been argued at great length, that the will under consideration is one connected scheme; that it should be construed so as to give to each portion of it the sense which results from the entire instrument, and that if this rule of interpretation be adopted, it must necessarily lead to one or the other of two conclusions—either the testator intended the general estate as the beneficiary, or he intended to create a trust in the sense of the English law, identical with that in *Franklin's* case; it is further said that as the intention of the testator, when ascertained, is the law of the will, in either

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alternative the disposition fails, and what has been termed a translation *nomine pœna*, is a mere vulgar substitution in favor of the State, expressly authorized by article 1508 of the Code.

I believe that the enquiry as to the nature of the title intended and who was the beneficiary, may be gone into in the manner suggested by the plaintiffs' counsel—and it is lawful to take into consideration for that purpose everything that is written in the will, whether legal and possible, or the reverse. It is to me a self-evident proposition—a proposition which I cannot demonstrate otherwise than by stating it—that for the purpose of ascertaining whether the title intended by *McDonogh* is a conditional, or impossible title, all the conditions attached to it, whether legal or illegal, must be considered. In *Franklin's* case the dispositive words of the bequest to the brothers of the testator, were the same as are made use of in this case. *Franklin* attached conditions to his bequests and provided that it should be in trust for the establishment of an institution of learning in the State of Tennessee. We took those conditions into consideration for the purpose of ascertaining what was the tenure intended, and being satisfied that it was a tenure unknown to our laws, we held that the disposition must fail, the nature of the conditions cannot affect the principle.

The very able juriconsults, whose *mémoire* has been submitted to us, evidently take this view of the law, or they would not argue from the nature of the illegal conditions imposed, that the testator intended a title in full ownership in favor of the Cities. The counsel here go still further when they assume as one of their grounds of defence, that the right of ownership in favor of the city results, not only from the express terms of the will, but also from the prohibitions to alienate, to compromise, and to attempt a partition of the property.

Art. 1506 does not reach that question, it applies only to illegal, immoral and impossible conditions attached to a title, otherwise valid.

But when all this is conceded and the different parts of the will are interpreted one by the other, they do not establish beyond all reasonable doubt the quality and quantity of the title intended and who was the beneficiary. The intention to give to the City for pious uses remains, at least, as probable as either of those suggested—in proof of this I deem it sufficient to state that each of the three judges who heard the argument, originally came to a different conclusion on this part of the case. The Chief Justice, after some hesitation, adopted the opinion, that the title intended was one to the cities in full ownership, with a destination to pious uses, which attached to the property. *Mr. Justice Slidell* thought, and still thinks, that the General Estate, for which the will provides, was intended as the beneficiary. I was under the impression that the holding intended was in the nature of a trust of the English law, and involved the legal and equitable titles which had caused the disposition in the will of *Franklin* to fail. My brethren have given at large the reasons of their respective opinions. I deem it unnecessary to state those upon which mine was predicated. The diversity of those opinions sufficiently shows that the question is not free from doubt, and the moment it is shown to be doubtful, the words used by the testator in the will are no longer to be construed and weighed; another rule of interpretation comes into play to solve the doubt.

If the disposition was in favor of the General Estate, it is gone.

If it establishes a legal and an equitable title in the technical sense of the English law, it is, in my opinion, equally gone.

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If it vests in this City a title in full ownership, with a destination to charitable uses, for which the City would otherwise be bound to provide, it is lawful, and may be carried into effect. How is it then possible to evade or disregard the textual provision of article 1706 of the Code—that a testamentary disposition must be understood in the sense in which it can have effect, rather than that in which it can have none?

When under all the different interpretations of which a testamentary disposition is susceptible, it is lawful and may be executed, the construction should rest upon the words and arguments used by the testator. But where one interpretation will give effect to the will, and the other would not, the decision of the law supercedes the discretion of the Judge, and commands him to assume that the testator intended what is lawful. A striking example of the nature of this rule is afforded by the decisions of the Courts of France, before and since the prohibition of substitutions in that country. When substitutions were authorized, the words of advice or request, in which the substitutions were often made, were held equivalent to words of command, as lawful wishes and desires of testators always are. But since substitutions have been prohibited, charges of substitutions thus made are disregarded, and the disposition becomes pure and simple. *Merlin* thus explains why the words, "I request," "I desire," although sufficient to express the will of the testator when their object is lawful, cease to be so when the disposition intended is prohibited:

"The reasons which might be adduced to attribute a binding force to the words, I request, I desire, are neutralized with us by the great principle drawn from the Roman law, that when there is doubt as to the sense of a disposition, the interpretation which tends to validate the act of which the disposition forms part, should be preferred to the interpretation which would avoid it. It is true that by thus interpreting the disposition, it is rendered illusory; but along side of the rule, that in cases of doubt the testator should be presumed to have written nothing useless, there is another which says, that in cases of doubt the testator is never presumed to have intended what the law forbids, and still less what would cause the failure of the principal disposition. In the conflict of those two rules, it is undoubtedly the first which must give way to the second." *Merlin, Rep. verbo sub. fid.* § 8, No. 7. See also 5 Toullier, No. 27; Grenier, *Donations et Testaments, ob. pra.* No. 10; Roland de Villargues, *Des Subs.* 175.

So in this case, we are bound to presume that the testator intended the disposition which he could lawfully make, to wit: a disposition in favor of the city of New Orleans, with a destination of the property given to pious uses. Having come to this conclusion, it is clear that the disposition cannot be affected by the illegal conditions and charges, which the vanity and avarice of the testator prompted him to attach to it, and that they must be reputed not written, under article 1506 of the Code. I do not think, however, that all those conditions are illegal which have been assumed in argument to be so. I believe that the condition not to alienate, for instance, is as binding in a case like this as in the dispositions made by *Almonaster* and *Fisk*, already referred to—and that a city may, in such a case as this, be deprived of the *jus abutendi* over its property for an object of public utility, without its right of property being affected thereby; the legislature having always the right to remedy the effects of the disposition whenever the alienation of the property given becomes of public advantage.

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It was urged with great earnestness in argument, that the will in this case is not distinguishable from that of *Mr. Henderson*, acted upon in 5th Annual, so far as both establish a perpetuity—and that the decision avoiding the disposition in that case ought to govern the present. The obvious distinction between the two cases is, that *Mr. Henderson* had made no disposition of his property in favor of any one, but had simply provided that it should for ever form part of his succession and be administered by his executors and commissioners to be named after them, to the end of time. While the testator in this case has made a valid disposition of his property, and the perpetuity of the bequest is merely the consequence of the perpetual existence of the legatee. The General Estate does not form, as is erroneously supposed, the object of the disposition. The bequest embraces nothing more than the fortune left by the testator at his decease. The gradual increase of the General Estate, contemplated by the testator, was to be the result of the mode of administration he had prescribed, which is admitted on all hands to be illegal.

It may further be observed that as there was no disposition of the property in *Mr. Henderson's* will, there could be no illegal or impossible conditions within the meaning of article 1506 of the Code. If the dispositions establishing the perpetuity, and providing for the erection of the town of Dunblane, had been reputed not written, the other dispositions, such as the building of a schoolhouse and a church in the projected town, should have been enforced, although manifestly a part of what the Court held to be an unlawful scheme, and inseparable from it. There being no interpretation under which the main disposition could be sustained, the subordinate dispositions necessarily fell with it.

I have not noticed the objection—why is it not permitted to give to one under any condition, and to make a second disposition in favor of another in case those conditions turn out to be illegal or impossible? because, as well observed in argument, the alternative in favor of the second legatee would be but a continuation of the illegal or impossible conditions which the law repudates not written, and it would be giving effect to a violation of the law, if a third person was permitted to profit by the refusal of the first legatee to violate it. No difference can be made on principle between cases where there is a second legatee and those in which there is not—the legal rights of the first beneficiary are the same in both.

I am of opinion that the judgment should be affirmed.

SLIDELL, J., (dissenting.) This controversy involves the interpretation of the testament of one who, after a long career of industry and avarice, died the possessor of a great estate. Leading a life of isolation, his heart appears to have become insensible to natural affection, and his mind morbid on the single subject by which it was engrossed. Hence, it is not surprising that he should have left at his death a Will, which, with the exception of a small legacy, excludes his kindred from any participation in his enormous fortune, and strives to carry out after his death the process of accumulation which he had so successfully prosecuted. His imagination, heated by solitary musing, saw through a long distant future the result of his cherished schemes, "in a huge mountain of wealth," with which he designed to found magnificent corporations, as imperishable monuments of his wealth and philanthropy.

The questions presented for our solution are, whether the scheme so elaborately prepared by the testator is valid in law, and if it be not, what other disposition consistent with his wishes is to be made of his estate.

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For the proper consideration of these questions, it is necessary to arrive at a distinct appreciation of the substance of his will, which is sufficiently manifest, although its style is verbose, and its details minute and complicated.

After a few special legacies of insignificant amount, the will proceeds to give the residue of his estate, real and personal, to the cities of Baltimore and New Orleans, not absolutely, but as he expresses it, "To and for the several intents and purposes hereinafter mentioned, declared and set forth concerning the same, and especially for the establishment and support of free schools in said cities and their respective suburbs, (including the town of McDonogh,) wherein the the poor, and the poor only, of both sexes, of all classes and castes of color, shall have admittance, free of expense, for the purpose of being instructed in the knowledge of the Lord, and in reading, writing, arithmetic, geography, &c." Had the will stopped here, or contained no subsequent provisions in a conflicting sense, it might be held to be a devise of the ownership to the cities for the purposes contemplated. But the proprietary right thus nominally given is afterwards, in substance, withheld, for he subsequently declares that his executors must invest his personal property in real, and that his intention is that the whole of his estate, real and personal, (except his slaves and the special legacies to his sister and her children,) is to be "a permanent fund on interest, as it were, to wit: a fund in real estate, affording rents, no part of which fund (of the principal,) shall ever be touched, divided, sold or alienated, but shall forever remain together as one estate, termed, in this my last will and testament, as 'My General Estate,' or 'The General Estate,' and be managed as I herein direct." Again, when he comes to prescribe this management, he uses the following language: "I hereby declare that my intention is not that any part of said general estate, or revenue from rents, arising from said general estate, shall go into the hands of the corporation of said city; but that they, the said corporations, shall have forever a supervision over it." He accordingly directs that the cities shall each annually appoint, until the end of time, three agents or commissioners, who shall have the sole and exclusive management of said general estate, the leasing of all the lands and houses, the cultivation of all the estates, the gathering of the crops, the collection of rents, and the doing all acts necessary to its full and perfect management. He confers upon the commissioners the seizin and possession of all the real estate from the day of their nomination. He directs his executors, after they have fulfilled their functions, to place all books of account and papers, &c., in the hands of these commissioners. They are to take an office in New Orleans, employ a secretary, and keep regular books, accounts, &c. They are to render accounts annually to the city of New Orleans, which are to be audited by a committee. They are to apply the revenues of the general estate as follows:

First—One-eighth of said revenues to the American Colonization Society, for the term of forty years from his decease, to be paid over from year to year.

Second—One-eighth part to the Mayor, Aldermen and inhabitants of New Orleans, for the sole purpose of establishing an Asylum for the Poor, until the sums paid should amount to the gross sum of \$600,000. This annuity is to be paid to other commissioners, not more than seven in number, to be appointed by the municipal councils of New Orleans. They are required annually to invest

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it in good securities, for the purpose of accumulation, until the full payment of the sum of \$600,000. After which, one-third of the accumulated fund is to be invested in the purchase of land for the Asylum, and the erection and furnishing of suitable buildings, and the residue to be invested in real estate, to become thenceforth inalienable, and its revenues to be applied to the support of the Asylum.

Third—One-eighth part of the revenues of the general estate to be appropriated to the benefit of the Society for the Relief of Destitute Orphan Boys, until the sum paid should amount to \$400,000. The fund to be deposited in bank by the commissioners, on interest, and as it accumulates to be invested in the purchase of real estate by said Society, which real estate is to be inalienable.

Fourth—One-eighth of said revenues to the City of Baltimore for the purpose of establishing a School Farm in Maryland, until the sum so paid shall amount to three millions of dollars. For the more rapid accumulation of this sum the will directs that so soon as the preceding legacies should be satisfied, the three-eighths bequeathed to them should be added to the school farm fund. The fund is to be received and managed by Directors, who are to be annually elected by the Mayor and Council of Baltimore, and to be subject to their supervision. The Directors are to invest the moneys thus received on interest, so as to augment its amount by the accumulation of interest to the largest possible sum, up to the time when the last payment of the three millions shall be received by them, when they are to invest a portion, not exceeding one-sixth, in land, buildings, furniture, implements, &c., for the School Farm, and the residue in real estate, which, when purchased, is never to be alienated, but its revenues applied to the support of the School Farm.

Fifth—The remaining one-half of the revenues of the general estate, to be divided equally between two other sets of commissioners, one to be appointed by the Councils of New Orleans, the other by the Council of Baltimore. These commissioners are required to devote the sums so received by them respectively to the support of public free schools, to be established in the two cities, and under their supervision. After the annuities created for the use of the Societies, the Asylum and the School Farm are satisfied, then the whole revenues of the general estate are to be paid over annually by the commissioners of the general estate to the commissioners of public free schools, in equal shares, and to be devoted to the support of such schools.

In various parts of his will, the testator suggests the incorporation of the several funds and institutions which he desired to create, accompanied by minute instructions respecting the mode of leasing his lots and lands, and administering the general estate.

He seems to have contemplated an ideal being, the General Estate as the true recipient of all his property, to be held for the purposes of the will. He recommends to the commissioners of the General Estate to sue out an act of incorporation of it, and in his instructions he observes, "the great object I have in view (as may be plainly seen,) is the gradual augmentation in value of the real estate, WHICH WILL BELONG TO AND BE OWNED BY THE GENERAL ESTATE FOR CENTURIES TO COME."

The will also contains the following clause, which, from its vital importance in the decision of this case, it is proper to insert *verbatim*:

"No compromise shall ever take place between the Mayor, Aldermen and inhabitants of the City of Baltimore, in the State of Maryland, and the Mayor,

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Aldermen and inhabitants of the City of New Orleans, in the State of Louisiana, and their successors, in relation to their respective rights in said general estate; nor shall one party receive from the other party, by agreement, a certain sum of money annually, or otherways, for their respective proportions in said general estate, nor shall either party sell their respective rights, under this will, in the said general estate, to one another, or to others; but said general estate shall forever remain and be managed, as I have herein pointed out, ordered and directed. And should the Mayor and Aldermen of the City of Baltimore, in the State of Maryland, and the Mayor and Aldermen of the City of New Orleans, in the State of Louisiana, or their successors in office, combine together, and knowingly and willfully violate any of the conditions hereinbefore and hereinafter directed, for the management of the general estate, and the application of the revenue arising therefrom, then, and in that event, I give and bequeath the rest, residue, remainder and accumulations of my said general estate, (subject always, however, to the payment of the aforementioned annuities,) to the States of Louisiana and of Maryland, in equal proportions to each of said States, of half and half, for the purpose of educating the poor of said States, under such a general system of education as their respective Legislatures shall establish by law. (Always understood and provided, however, that the real estate thus destined by me for said purpose of education, shall never be sold or alienated, but shall be kept and managed as they, the said Legislatures of said States, shall establish by law, as a fund yielding rents forever, the rents only of which general estate shall be taken and expended for said purpose of educating the poor of said respective States, and for no other.) And it is furthermore my wish and desire, and I hereby will, that in case there should be a lapse of both the legacies to the cities of New Orleans, in the State of Louisiana, and Baltimore, in the State of Maryland, or either of them, wholly or in part, by refusal to accept, or any other cause or means whatsoever, then both or either of said legacies, wholly or partially so lapsed, shall inure, as far as it relates to the City of New Orleans, to the State of Louisiana, and as far as it relates to the City of Baltimore, to the State of Maryland, that the Legislatures of those States respectively may carry my intentions, as expressed and set forth in this, my last will and testament, into effect, as far, and in the manner which will appear to them most proper."

When the provisions of this will are considered as a whole, it appears to me impossible to regard the Cities of New Orleans and Baltimore as invested by it with any title known to our laws. It is asserted by the counsel for the defendants that the Cities are, in legal contemplation, the owners of the property devised. But I am unable to conceive, under our system, an ownership stripped forever of the right of possession, use, administration and disposal. Such an estate has no warrant in our Code, nor precedence in our jurisprudence.

The law, from wise motives, permits men to exercise a last act of volition over their estate, by disposing of its ownership. But when they exercise this just privilege, they must exercise it under the law. They have no right to invent new tenures of property. I think there is much wisdom in what was said by the Chief Justice in *Harper v. Stanbrough*: "The modifications of the right of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on the Courts to maintain them in their simplicity."

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The defendants seek to escape this difficulty by first assuming that the testator intended to confer the ownership upon the Cities, and then contending that those subsequent provisions which regard the possession, administration and disposing power, are to be considered as conditions illegal, or contrary to public policy, and consequently as not written; and so, they argue, the bequest to the two Cities must be reduced to a pure and simple legacy, or to a legacy modified only by the conditions found compatible with public policy and the laws.

In assuming that the right of ownership in favor of the Cities results from the express terms of the will, the counsel for the defendants appear to me to err. The language is not, I give and bequeath to the Cities, but, I give and bequeath to the Cities to and for the several intents and purposes hereinafter mentioned. Those intents and purposes are fully expressed in subsequent clauses of the will; being thus referred to, they must be considered as embodied in the devising clause, and clearly qualify and limit it. The argument, therefore, starts from erroneous premises, when it assumes that there was a devise to the Cities of the ownership.

No one can peruse the will without a clear conviction that *McDonogh* was unwilling to trust the city governments, and believed that to invest them with the dominion of an owner, would jeopardize the security of the estate, and the success of the scheme which he had devised. No one was more familiar than the testator with the history of our city government, and the disastrous financial results of its administration. Hence it is that he entrusts the possession and administration to other hands, forbids the city ever to sell a single item of property, and prohibits the passage of a single dollar into their hands. The intention of the testator to withhold from the cities the *ownership* of his estate, in any sense of that term known to our law, seems to me to admit of no doubt. It is interwoven with the whole theory of the will, and speaks unmistakably through its entire context.

The truth is, that the real legatee intended and preferred by *McDonogh*, was the ideal being which he designates as his General Estate. The cities were intended to be the mere supervisors of the perpetual trust which he desired to create, and which, in its turn, was to be the source of the other trusts contemplated in the will.

But while on the one hand the title proposed to be vested in the cities is unknown to our laws, on the other, the ideal being which the will contemplates has no legal existence, and is consequently incapable of taking.

And here it is proper to observe that the aid which the testator expected from legislation is now manifestly hopeless. The States of Louisiana and Maryland have both spoken through their proper organs, and by ratifying upon their statute books the institution of the present suit, have clearly disapproved the scheme of future incorporations contemplated by the will. See Statute of Louisiana, March 12, 1852, and Statute of Maryland, January, 1852.

Moreover, the purposes which the testator desired to accomplish through this ideal being, are in part manifestly unlawful. It was his ambition to effect a huge accumulation by a protracted system of investment and re-investment. Not only was any sale of the real estate existing at the time of his death forbidden, but his personal property was ordered to be invested in real estate, interest was to be accumulated on interest, leases were to be so effected that the improvements were to fall into the estate at the end of the terms; in short, the

fortune of the testator, so administered as if possible to increase it more and more during a long distant future. That such a scheme is inconsistent with public policy, no one will deny. It would withdraw large masses of property from commerce; it would put the administration of a great landed estate into the hands of agents having no personal interest in its well-being; it would be a check upon improvement wherever these lots and lands are situate, and in fact become a huge nuisance, whose evils would be aggravated from year to year. No unbiassed mind will regret the defeat of projects so unreasonable and pernicious.

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Yet these evils are so interwoven with the scheme devised by the testator, that an attempt to purify it of them would involve a destruction of the scheme itself, which the testator desired should be accomplished in its entirety, declaring a violation of *any* of his conditions by the cities a cause of forfeiture.

But if the system thus elaborately planned by the testator, and by which, through the instrumentality of mere nominal devisees, he sought to create an ideal being as the recipient of his estate, the engine of a vast accumulation, and the founder in a far-off future of magnificent charities, must fail, because it creates a tenure of property unknown to our laws, because it exceeds the power granted by law to testators, and because it would violate public policy, what other disposition is to be made of his estate?

This question is fully answered by the testator himself. It is to go, not to his natural heirs, whom by the clearest implication he intended under all circumstances to exclude, but to the States of Louisiana and Maryland, as absolute owners, leaving it to them to employ his fortune in the accomplishment of his philanthropic intentions, "as far and in the manner which will appear to them most proper."

Unquestionably the testator's preference was for the extraordinary scheme which he had so elaborately prepared, and over which he had no doubt brooded for years with a morbid delight. He desired it to be carried out in its *entirety*, and forbade the cities to violate *any* of its conditions. But still an apprehension existed in his mind that the scheme might fail; and from "whatsoever cause" this failure might arise, by "whatsoever means" it might come to pass, his desire was that there should then be recipients of his fortune, who, by virtue of their sovereign power, could accomplish the substantial execution of such of his wishes as they might consider lawful, and to whose discretion and fidelity he was willing to leave that execution. The great object of the testator was the education of the poor. "I can make no disposition of those worldly goods which the Most High has been pleased so bountifully to place under my stewardship, that will be so pleasing to Him as that by means of which the poor will be instructed in wisdom, and led into the path of virtue and holiness."

That paramount object, with other wishes of the testator, so far as they may be deemed practicable and politic, the States can, and no doubt would, in good faith, and with a just discretion, endeavor to accomplish, and thus the charitable object of the testator would be disappointed only as to the preferred mode of its fulfillment, an alternative of his own choice being adopted.

The above opinion necessarily involves the proposition that the natural heirs of the testator have no right to his succession beyond the specific legacies left to a portion of them. For we could not render a decree in favor of the plaintiffs in this action as owners of the succession, if a valid title were outstanding in others. The heirs have thought proper to appear in another forum, avoiding

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the State tribunal in which the succession of the testator was opened. Still, although they are not before us, and our decree may not be technically binding upon them, I deem it my duty briefly to notice the grounds upon which I understand their claims to be predicated.

In considering the controversy between the Cities and the States, I was controlled by what I believed to be the intention of the testator, as gathered from a reasonable interpretation of the entire will. The same course of investigation seems to me decisive of the pretensions of the heirs.

The intention of the testator to cut off his natural heirs, beyond the specific legacies left to them, seems to me irresistibly manifest from the whole scope and purport of his will, and is peculiarly deducible from the scantiness of the legacy left to his sister and her children, and his declaration, "had I children (which I have not,) and a fortune to leave behind me at my death, I would bequeath (after a virtuous education, to effect which nothing should be spared,) a very small amount to each, merely sufficient to excite them to habits of industry and frugality, and no more." And again, that other declaration: "The first, principal and chief object I have at heart, (the object which has actuated and filled my soul from early boyhood with a desire to acquire a fortune,) is the education of the poor (without the cost of a cent to them,) in the Cities of New Orleans and Baltimore, and their respective suburbs, in such a manner that every poor child, and youth of every color, in those places, may receive a common English education, (based however, be it particularly understood, on a moral and religious one, that is, the pupils shall, on particular days, be instructed in morality and religion, and school shall be opened and closed daily with prayer.) And in time, when the general estate will yield the necessary funds, (for in time its revenue will be very large,) over and above what will be necessary to the education of the poor of those two cities and their respective suburbs, it is my desire, and I request that the blessing of education may be extended to the poor throughout every town, village and hamlet in the respective States of Louisiana and Maryland, and, was it possible, through the whole of the United States of America. For this purpose, and this only, my desire being that one dollar shall never be expended to any other purpose, I destine the whole of my general estate (excepting only my black people, the legacy bequeathed the children of my sister *Jane*, and that to herself,) to form a fund in real estate which shall never be sold or alienated, but be held and remain forever sacred to it alone."

In the face of these declarations, and of the entire scope and purpose of the will, it would be monstrous to say that *McDonogh* did not intend to exclude, at all events, his heirs at law. Indeed, the counsel for the heirs expressly concede that point in their printed argument, a copy of which was submitted to this Court in the recent case of *Franklin's* heirs. "The testator," they acknowledge, "certainly intended to exclude his heirs at law forever, and they do not claim one cent under the will or the intention of the testator."

Their hopes rest upon the proposition "that the testator did not dispose of the title and ownership of his estate. He attempted to build up magnificent trusts and charities out of the future revenues, but he kept the ownership for himself. As to the ownership, he died intestate, and it passed to his heirs at law."

I have carefully considered the ingenious argument by which counsel have endeavored to support this startling proposition, but it has brought no favorable

convictions to my mind. It is narrow and technical. It asks from an unprofessional mind the nice accuracy of an expert conveyancer. This is contrary to the received theory of the interpretation of wills. The law is indulgent to testators who are regarded as *inopes consilii*. It exempts the phraseology of wills from technical restraint, and obeys the clear intention of the testator, however informal the language in which it may be announced. If that intention be even obscured by conflicting expressions, it seeks the intention rather in a rational and consistent, than an irrational and inconsistent purpose. Of two modes of construction, it prefers that which will prevent a total intestacy. Such is the spirit of our Code, and the teaching of the commentators.

Approaching the interpretation of the will in this spirit, looking to the language used in the devise to the States with reference to the surrounding provisions, and the general scope and purpose of the will, which is the work of an unprofessional mind, I have, from the first, experienced little difficulty in appreciating the intention and meaning of the testator.

By the lapse of the legacies to the cities, I am clearly of opinion that he meant their failure to take effect from any cause whatever.

By the expression, "said legacies wholly or partially so lapsed shall enure," &c., he evidently meant the property embraced in those legacies.

To say that under the clause in question he simply intended to place the States in the stead of the Cities—their actions fettered by the same restrictions—their title qualified and limited by the same anomalous provisions as to possession, use and management—is to obliterate from that clause its closing words, which commit to the States respectively a dominion controlled only by their own discretion.

[The judgment of the Court will be found at page 252.]

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The purchaser of property, under a probate sale, who assumes the payment of a mortgage resting upon the property, cannot urge that the sale cancelled the mortgage; nor are such purchasers third possessors, in the sense which would require the holder of the mortgage claim to pursue his rights under the hypothecary form of action.

A PPEAL from the Sixth District Court, Parish of West Baton Rouge. *Burk, A. J. Lacey*, for plaintiffs. *Brunot*, for defendants and appellants.

DUNBAR, J. *Amaranthe Landry*, widow of *J. B. Hébert*, sold on the 29th January, 1842, to *I. F. and E. P. Woods*, a small plantation, and thirteen slaves, situated on the Mississippi river, for the sum of \$28,000, payable as follows: \$7000 in a note at short date, \$3960, divided into three notes of \$1000, \$1960 and \$1000, payable at one year thereafter to her order, and \$17,040, the balance, in an assumpsit of that sum, due by the vendor to her minor children, whose tutrix she was, payable as they should respectively become of age. All the instalments to bear an annual interest of ten per cent.; the amount retained for the minors being subject to the same interest, payable annually. For the security of all these payments a vendor's lien and special mortgage was retained.

Adolphe Hébert having, in the course of business, become the owner of one of the above notes for \$1000, instituted suit thereon against the makers, and

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recovered a judgment against the representatives of their estates, with a full recognition of the vender's lien and special mortgage given to secure the faithful payment of it. This judgment was obtained on the 30th June, 1847, and was subsequently affirmed by this Court, in March, 1848. See 3d Annual, p. 254.

Isham F. Woods, one of the original purchasers, having died, his half of the estate was purchased at probate sale by *E. P. Woods*, the owner of the remaining half, who assumed to pay the one-half of the debt of \$17,040, due to the heirs of *Hébert*, and for which the whole estate remained mortgaged. *E. P. Woods* dying some time afterwards, the estate was again offered at probate sale and on the 9th of February, 1848, adjudicated at public auction to the present plaintiffs, for \$23,230. A deed thereof in due form was, on the 8th January, 1849, executed in their favor by *F. A. Woods*, the executor of the deceased, which states that the purchasers retained in their hands, and assumed to pay the sum of \$20,965 74, being the estimated amount due on the mortgage originally given in favor of the widow and heirs of *Hébert*, including the interest and costs; for the balance the purchasers executed their obligations in favor of the executor, at one and two years.

Doussan, the present defendant, was at this time the holder and owner, by notarial act of transfer, of the judgment obtained by *Adolphe Hébert* against the estate of *Woods*, which, as we have seen, was not only personal against the estate, but executory against the mortgaged property. On an execution issued under that judgment, the defendant was about to seize the mortgaged premises in the possession of the plaintiffs, when he was restrained by an injunction, the origin of the present suit. The cause was twice submitted to a jury, who, upon each trial, rendered a verdict in favor of the plaintiffs. The defendant has appealed. The grounds assumed by the plaintiffs in injunction, are as follows :

1st. That the mortgage and vendor's lien, originally retained by the widow and heirs of *Hébert*, were both extinguished by the probate sales of the property made after the death of *I. F.* and *E. P. Woods*, and that the present defendant must look not to the property, but to the representative of their estates, for payment.

2d. That if the mortgage still rests upon the property, the plaintiffs are third possessors, and as such entitled to the delays accorded by law, and are only suable in the hypothecary form of action.

3d. That *Doussan*, being but the transferee of a judgment, had no right to an execution in his own name thereon without an order of Court, or without being made a party to the record, and

4th. That they are apprehensive of eviction, and have a right to demand security.

The first and second grounds we shall consider together.

It is much to be regretted that notaries and others to whom, most frequently, the duty is entrusted of framing the conventions entered into by parties not acquainted with the technicalities and exactness required in legal documents, should so often draw up their deeds without due preparation. Obscurities and doubts are found where all might have been rendered accurate and clear, after forcing the parties to either a loss by compromise, or one still greater, by expensive and protracted litigation. These remarks are drawn from us by an examination of the terms of sale, as stated in the deed, from *F. A. Woods*, executor, to the plaintiffs. Its language is as follows : " For the price of \$23,230, paid and to be paid in the manner following, to wit: by mortgage for vendor's privilege

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resting on the property at the time of sale in favor of widow and heirs of *Jean B. Hébert*, amounting to the sum of \$20,965 74, including interest and costs," &c. That mortgage was originally reserved to secure the payment of no less than five different obligations, four of them negotiable, and all varying in amount. Which of them were included in the above estimate of \$20,965 74, the deed does not explain, nor how that amount was arrived at.

In the petition for injunction the plaintiffs do not deny that the defendant's judgment was included in the sum retained by them, and on the second trial opposed the introduction of the notary and vendor as witnesses to establish that it was. If the judgment was included, then so far from the mortgage being extinguished by the probate sale, we shall find that it is specifically retained, and if the purchasers, the present plaintiffs, assumed to pay it as a part of their purchase money, retained by them, for that purpose, in their hands, then the plea of being *third parties* comes with a bad grace. See *Woodward v. Dashiell*, 15 La. R., 184. Happily, the plaintiffs have answered the question, and solved the doubt. In an affidavit for continuance, filed by them, and sworn to by *Ernest Hébert*, one of the plaintiffs, we find the following admission: "That in consideration of said purchase, this deponent and his co-plaintiffs agreed to assume, and did assume, to pay the amount due and unpaid on the sale to *I. F. and E. P. Woods*, as set forth, &c., including the notes of one thousand dollars above mentioned; and this deponent further saith, that by reason of the foregoing, the notes of one thousand dollars formed a part of the price agreed to be paid, subject, however, to be made out of deponent, if not paid in due course of legal proceedings, and furthermore subject to such equities as the law may create in the premises." The provisos are not to be found in the deed of sale, and if they were, the plaintiffs have not brought themselves within them. It is, therefore, established beyond doubt, that the probate sale of the property of *Woods* did not purge it from the mortgage in favor of the widow and heirs of *Hébert*, of which the present defendant has the benefit, but re-affirmed it, and that by their assumption of the debt, the plaintiffs are not third parties.

The execution obtained by defendant, issued in the usual and customary form, directing that if the debt could not be made out of *Woods*, the Sheriff should seize the mortgaged premises, and on making the money should pay it over to *Doussan*. In this we see nothing illegal or irregular. *Doussan* was the holder of the judgment by notarial act, of which we presume the Clerk had cognizance, and in directing that the proceeds should be paid over to the true owner of the debt, we are at a loss to know of what the plaintiffs have to complain.

As regards the plea of apprehension of eviction, no evidence has been offered to substantiate it, and it is only where one has "*just reason* to fear that he will be disquieted," that the law accords to the purchaser the right of requiring security. See C. C., Art. 2535. Nor are we to be understood by any means as admitting that even had the plaintiffs established "*just grounds*" for apprehension of eviction, they could have acquired security from *Doussan*, who was not the seller of the property, and neither was his transferrer, *Adolphe Hébert*. The latter came into possession of a negotiable note, in the ordinary course of trade, as we are bound to presume from the record; obtained a judgment upon it, with a recognition of the mortgage given to secure its payment; and should it now happen that the consideration for which it was given has failed in whole or in part, the plea cannot be raised against him. We consider *Doussan* as holding the same right as *Adolphe Hébert*, and no more. But the plaintiffs

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themselves seem finally to have abandoned their apprehensions. On the first trial, at the fall term in 1851, they voluntarily abandoned this ground of attack, upon the plea that they were ruled into trial without having the necessary surveys returned; but shortly afterwards the survey was returned into Court, and upon the second trial had in March, 1852, three years from the time the injunction was first obtained, they seem to have made no effort to have the matter tested. We must conclude that they had no just reason to fear that they would be disquieted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower Court be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered, it is ordered that the injunction obtained in this case be dissolved, and that the defendant, *A. J. Doussan*, recover from the plaintiffs and their sureties, upon the injunction bond, in *solido*, the sum of two hundred and fifty dollars, as special damages; that the Sheriff proceed with the execution of the writ enjoined; and that plaintiffs pay costs in both Courts.

HEIRS OF WILLIAM MAGUIRE v. JAMES A. BASS.

Where heirs have been recognized as such and put in possession of the succession afterwards, and obtained a judgment on the final account rendered by the Curator—it is sufficient evidence of their capacity as such to authorize a judgment against the Curator's surety. The burthen of proof will rest on the other party.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Copley, J. Drew & Bonner*, for plaintiffs. *Selby*, for defendant and appellant.

ECSTIS, C. J. This suit is brought by the heirs of the late *John McGuire*, of the parish of Carroll, against *James A. Bass*, one of the sureties on the bond of *William Glathary*, who was the curator of the succession of the deceased.

Judgment was rendered against the defendant for some \$800 and costs, and he has appealed.

The main objection taken to the correctness of the judgment of the Court, is the want of sufficient proof of the heirship of the plaintiffs.

Their capacity has been recognized by two judgments of the District Court against the curator, one recognizing the plaintiffs as heirs and putting them in possession of the succession as such, and the other rendered on the final account filed by the curator. These proceedings were sufficient evidence of heirship to authorize a judgment against the curator's surety. It rested with the defendant to impugn them by counter evidence, which has not been done.

The suit being instituted by attorneys at law, and the proceedings having been conducted by officers of the Court, there is no necessity in this suit to enquire into the authority of one of the heirs who sues as attorney in fact.

The judgment, on which this suit is brought, was rendered on an opposition to the curator's account, filed at the suit of the plaintiffs. It appears to have been consented to by the curator, but his attorney swears that it was for the

sum he thought was due the heirs, according to the vouchers and evidence of debt before him.

The return of the Sheriff, in this execution, issued against the curator, we think is sufficient to warrant the judgment against the surety. Besides it is proved that the curator is notoriously insolvent.

We do not examine the exception of the defendant to the admission of the powers of attorney of the plaintiffs, because there was no necessity for proving them, and the case is against the defendant without them.

The judgment appealed from is affirmed, with costs.

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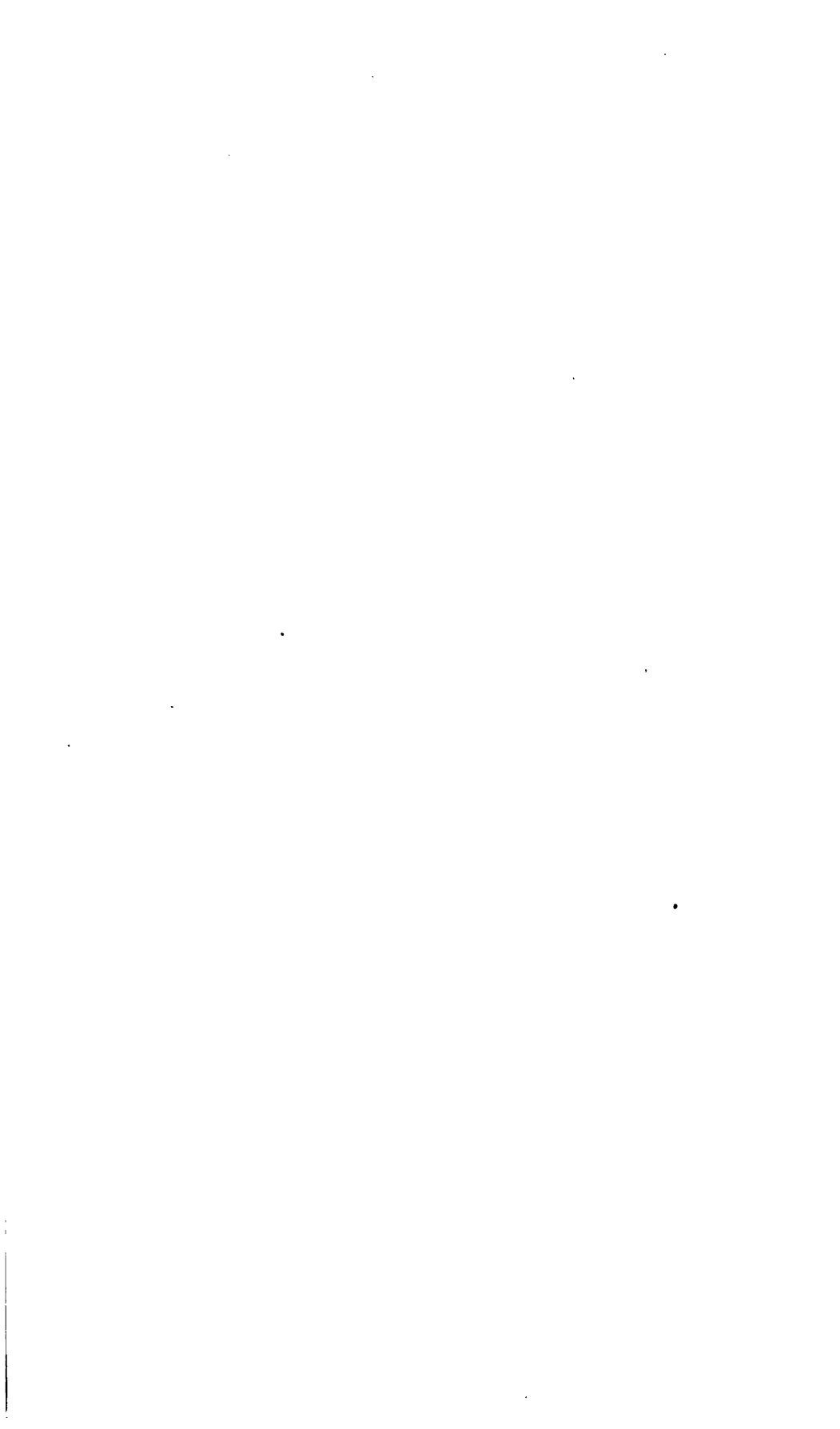


R E P O R T S
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
LOUISIANA.

FROM THE ORGANIZATION OF THE COURT UNDER
THE CONSTITUTION OF 1852.

W. M. RANDOLPH,
REPORTER.

NEW-ORLEANS:
PRINTED AT THE OFFICE OF THE LOUISIANA COURIER.
1854.



JUDGES
OF THE
SUPREME COURT,

UNDER THE CONSTITUTION OF 1852.

HON. THOMAS SLIDELL, *Chief Justice.*

HON. C. VOORHIES.	}	<i>Associate Justices.</i>
HON. A. M. BUCHANAN,		
HON. A. N. OGDEN,		
HON. J. G. CAMPBELL.		

THE MEMBERS OF THE COURT WERE ELECTED UNDER THE CONSTITUTION OF 1852,
AND THE COURT WAS ORGANIZED MAY 4, 1858.

Attorney General:
ISAAC E. MORSE, Esq.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN

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JUDGES OF THE COURT.

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ALMIRA GATES v. JOHN WALKER.

Caldwell was appointed curator of the succession of *Gates*. He filed a tableau which was opposed by *Marks*, through *T. A. Bartlette*, attorney at law, *Marks* claiming to be a creditor as vendor of goods to one *Johnson*, for whom *Gates* became surety, as *Marks* alleged. The evidence was altogether parole. *Marks'* claim was rejected, but by consent of counsel a judgment of non-suit was entered. Subsequently, *Caldwell* absconded, and *Walker* applied for the curatorship, through *Bartlette*, was appointed, and obtained judgment against *Leefe*, *Caldwell's* surety. Execution issued against *Leefe*, and the return showed that before sale of the property seized, the case "was settled by the parties." During the summer vacation, *Walker* filed a tableau recognizing *Marks'* claim, which, not being opposed, was allowed; but the judgment of homologation was never signed. *Almira Gates*, the widow of *Gates*, sued to set aside the homologation, charging collusion between *Marks* and the curator, *Walker*. By the Court, the recognition of *Marks'* claim by the curator was collusive. *Walker* obtained the curatorship for the sole purpose of obliging *Marks*, and of enabling him to make his claim. It was an abuse of the forms of legal proceedings for the curator, under the circumstances, to place upon the tableau a claim which had been rejected, after trial before the Court. Where the return of an execution against the surety of a defaulting curator shows that the case was "settled by the parties," the creditors, in the absence of further explanation, have a right to consider the amount of the execution as having been paid in cash. The wife of the deceased, though she had lived apart from him, was not judicially separated from bed and board, and she had an interest in his estate, at least for the purpose of presenting her claim for the marital portion for adjudication. It seems that a Judge, in whose Court the *mortuaria* are pending, may *proprio motu* entertain an inquiry into an abuse of the form of legal proceedings in his own Court, such as this case presents.

APPEAL from the Second District Court of New Orleans. *Lea*, J. *Spring*, for plaintiff. *Bartlette*, for defendant and appellant.

SLIDELL, C. J. *Spencer Gates*, whose occupation was that of a deputy sheriff in New Orleans, died here in January, 1849. *John S. Caldwell* was appointed his curator. The total estate left by the deceased amounted to \$1965. In 1850

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Caldwell filed a tableau of distribution, and *E. J. Marks* made opposition, claiming to be a creditor in the sum of \$768 50. This amount was alleged to be due by the deceased, as surety of one *Johnson*, for a purchase of merchandize made by *Johnson* from *Marks*, on the 15th December, 1848. In this matter, *T. A. Bartlette, Esq.*, acted as the attorney of *Marks*. After a trial in the usual course, the Court rejected the claim of *Marks*, but before the judgment was signed, it was, by consent of counsel, amended so as to be a judgment of nonsuit only, reserving to *Marks* leave to exercise his rights, if any he had, by subsequent proceedings. The District Judge gave at length his reasons for the rejection of the claim; and as they have a material bearing upon subsequent matters, out of which the present controversy has grown, it is proper to quote his remarks on that occasion:

"The testimony," says the District Judge, "in regard to this claim is very unsatisfactory. It is supported entirely by parole proof, under circumstances which render it improbable, that if the claim were correct, no better evidence could have been offered; there is no detailed account offered, and no proof of any specific sum due. It is hardly probable that a person who was unwilling to credit the purchaser of his goods, should be willing to sell at a year's credit, upon the security of a mere stranger, without taking a note, or some written evidence of the debt; and it is so easy a matter after one's decease to procure evidence to prove admission, alleged to have been made by him before his death, which, from the fact that they are mere verbal admissions, it is impossible to contradict, that testimony of this kind should be received with great caution. I do not feel satisfied that opponent has a good claim against the succession of *Gates*. It appears, according to the testimony of the principal witness, that *Marks* tried to get a written acknowledgment from *Gates*, but could not get it. If, indeed, the claim be a good one, it is opponent's own fault that there exists no better evidence of it, or that none has been offered. I do not mean to lay it down as a rule, that parole evidence may not sustain even large claims against the estates of deceased persons; but under such circumstances, to be entitled to any weight, it should be definite, positive and supported by circumstances giving it probability, both as respects the relation of the parties and the opportunities of information within reach of the witnesses. The claim is, therefore, rejected."

Subsequently, *Caldwell*, the curator, absconded and died; and *John Walker*, by his attorney, *T. A. Bartlette*, applied for letters of curatorship. After due proceedings, he received them in February, 1851. He then brought suit against *Leefe*, the official surety of *Caldwell*, and recovered judgment for \$909 40, and interest, the amount of funds of the estate of *Gates* for which *Caldwell* was a defaulter. By the return of an execution issued against *Leefe* for the amount of the judgment, it appears that on the 29th July, 1851, after a seizure of property had been made, and before the day of sale arrived, the case was "settled between the parties," an expression which, unexplained, the creditors and heirs of the succession have a right to treat as evidence that the curator, *Walker*, had collected in cash the amount of the judgment. On the 31st July, 1851, the period of the usual summer vacation, when little business is done in the Courts, *Walker* filed a tableau of distribution, in which he states the amount of claims against the estate, which he proposes to pay, and includes among them the claim of *E. J. Marks* for \$768 50, and interest from 1st January, 1850. No creditor appeared to oppose, except the Clerk of the Court, who claimed a privilege for a small amount of fees. On the 8th August, 1851, a judgment was rendered, which, after reciting that due publications had been made, sustained

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the opposition of the Clerk, and homologated the tableau so amended. This judgment, however, remained unsigned; and in December, 1851, *Almira Gates*, the wife of the deceased, instituted a proceeding before the same Court to set aside the decree of homologation, on the ground of fraudulent collusion between the curator and *Marks*. There was judgment setting aside the decree, and reforming the tableau by striking from it the item of \$768 50, allowed to *Marks*, and reducing the fee of *Mr. Bartlette* to \$70.

An examination of the evidence constrains us to adopt the conclusion which which forced itself upon the mind of the District Judge. We consider the recognition of *Marks'* claim collusive, and concur fully in the reasons assigned by the District Judge, who remarked as follows:

"This case is presented upon the issue made to the suit instituted herein, for a nullity of the judgment of homologation of the account of *John Walker*, curator, filed on the 23d June, 1851. The material allegations of the petition, so far as relates to the legal merits of the case, are substantially proved. The claim of *Marks* for \$768 50 had been fairly presented, on evidence which was unsatisfactory, and rejected. This was well known to *Marks'* counsel, who acted, also, as *Walker's* counsel. In fact, it appears that *Walker* obtained the curatorship for the sole purpose of obliging *Marks*, and of enabling him to make his claim out of the estate. It was an abuse of the forms of legal proceedings for the curator, under the circumstances, to place upon the tableau a claim which had been rejected after trial before the Court, and it appears from the tableau that *Marks'* claim is the only debt placed on the tableau which is not incident to the new administration. Viewing the matter in this light, I declined to sign the judgment of homologation, when made acquainted with the facts. On the trial of the case, new evidence in support of *Marks'* claim was introduced, and the trial was proceeded in, as if upon an opposition to the tableau. The matter may be considered, therefore, as open for an adjudication upon the merits of the whole case, and have nothing to add to the reasons given on the first trial of *Marks'* claim, except to say that I am not satisfied that *Gates* ever became surety for the debt which is now sought to be collected from his estate."

It is said there is no evidence in the record that the plaintiff in these proceedings has any interest in the succession of *Spencer Gates*.

We consider it satisfactorily proved that *Almira* was the lawful wife of the deceased. Whether she is entitled, as widow in community, not having cohabited with him for many years, and having lived in the North, it is immaterial now to inquire. They, it would seem, never had any children; he died intestate, and it does not appear that he left any ascendants, or collateral relations. If he did not, she would inherit from him, not having been separated from bed and board from him. C. C., Art. 918. There was in this case an estrangement from some cause unexplained, and an actual living apart; but we understand the separation from bed and board (*separation de corps et de biens*), contemplated in the Code, Art. 918, to be a judicial separation. No authority to the contrary has been cited for the defendant, and we are not aware of any. If, on the contrary, he did in fact leave collateral relations, of which we have no evidence, still she would have an interest in the preservation and due administration of the estate, having a right in due season to present for adjudication her claims for the marital portion.

Besides, we are not prepared to say that a Judge, in whose Court the *mortuaries* are pending, may not *proprio motu* entertain an inquiry into an abuse of the forms of legal proceedings in his own Court, such as is here presented.

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There was another proceeding in the matter of this succession, which resulted in a separate judgment, from which, also, the defendant has appealed.

It was a judgment, on rule, dismissing the curator from office, and condemning him to pay twenty per cent. interest on \$909 40, from August 8th, 1851, until paid.

We are of opinion there is no error in the judgment. The penalty is prescribed by the act of 1837, p. 95. The facts of this case bring it within the statute. The curator, as we have said, is to be considered as having received a cash amount of (at least) \$909 40, from *Leefe*, on the 29th July, 1851. He did not deposit in Bank. He has shown no payment of this money to any creditor, except a sum of \$693 12 to *Marks*, on the 15th October, 1851, which payment was collusive and void. It is asserted by counsel that the other creditors, among whom, by the tableau, it was proposed to distribute the fund, have been paid; but there is no proof of it. So, that whatever equity there might perhaps be to exempt a curator from the penalty, from the time he actually used money to pay a just debt, there is no proof to let in its application in the present case.

The two judgments are affirmed.

It is, therefore, ordered, adjudged and decreed that the judgment of the Court below, on the trial of the rule of the 8th of June, 1852, be affirmed, with costs. It is further ordered and decreed that the judgment of the Court below on the application of *Widow Almira Gates*, for nullity of judgment, be affirmed, with costs.

Re-hearing refused.

JOHN WATSON v. C. R. KENNEDY.

Suit for damages for wrongful attachment. Defendant pleaded that plaintiff had *illegally neglected* to bond the property attached. *Held*:—The right to set aside an attachment by delivering to the Sheriff an obligation to satisfy the judgment that may be rendered against him, is a privilege which the law accords to the defendant—and not a duty enjoined, and the attaching creditor cannot complain if the defendant fails to exercise it.

In cases of this character, based on the tortious acts of defendant, the jury are the legitimate judges of the *quantum* of damages, and the law leaves them much discretion.

APPEAL from the District Court, Third Judicial District, *Clark, J. Livingston*, for plaintiff. *Cohen*, for defendant and appellant.

CAMPBELL, J. This suit was instituted for the recovery of damages, alleged to have been sustained by plaintiff in consequence of the illegal seizure of his property by defendant.

It is alleged, that on the 27th August, 1850, defendant instituted suit against plaintiff by attachment, as endorser of a note for \$1035. That under this proceeding, property of the value of from two thousand seven hundred to three thousand three hundred and seventy-five dollars, and money to the amount of two thousand five hundred dollars were attached—amounts much more than sufficient to satisfy the demand of the attaching creditor. That on the next day, and pending the suit referred to, defendant instituted another suit on the same cause of action, and caused to be attached some ten thousand barrels of coal, worth at the time seventy-five cents per barrel, but which at the release

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of the seizure, upon the dismissal of the suit, (Nov. 29,) from a fall in the market, were worth but forty cents per barrel; wherefore he claims in damages the difference between the price at which the coal could have been sold during the seizure and its market value at the date of its release and delivery, which he alleges amounts to at least three thousand five hundred dollars. He further alleges that the seizure in this suit was illegal, vexatious and oppressive, and intended to embarrass him.

To this petition defendant filed a general denial, and by supplemental answer claimed five hundred dollars as damages resulting, as is alleged, from the "illegal and malicious conduct of plaintiff." On these issues the parties went to trial. The case was submitted to a jury, who returned a verdict of one thousand dollars in favor of plaintiff.

From the record it appears that the suit, instituted in the Third Judicial District Court on the 28th August by the defendant *Kennedy*, was dismissed the 25th November, on the plea of *lis pendens*, and that, on appeal to the Supreme Court, the judgment dismissing the suit was affirmed, 6 Ann., 807. From this and other facts disclosed by the records—as for example, the issuing of the first attachment before the right of action arose—the large value of the property seized as compared with the amount of the demand—the institution the next day, in a different tribunal, of another suit by attachment, against the same party, on the same cause of action—from all this we are satisfied that the suit complained of was uncalled for and vexatious, and prosecuted without due regard for the rights of the defendant.

It is urged by the defendant, as an objection to the demand of plaintiff and in support of his own claim for damages, that plaintiff *illegally neglected* to bond the property attached. The right to set aside an attachment by delivering to the Sheriff an obligation to satisfy the judgment that may be rendered against him, is a privilege which the law accords to the defendant, and not a duty enjoined, and the plaintiff cannot complain if he fails to exercise it. There is nothing in the evidence which supports the assertion made by the defendant in his printed argument, that plaintiff did not bond the property "solely to lay the foundation for a claim for damages."

In cases of the character of this, based on the tortious acts of the defendant, the jury are the legitimate judges of the *quantum* of damages, in the assessment of which the law leaves them much discretion; C. C. 1928, n. 3; and in view of all the facts, (notwithstanding the testimony on this point is somewhat conflicting,) we are unable to say that this discretion has been improperly exercised by them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

A. REINE, Agent, &c., v. C. H. POUMAIRAT & Co.

Action for the price of sugar sold. Defendant pleaded non delivery. Plaintiff offered to deliver the sugar, and placed the defendant in default by giving him a written notice to attend on the day fixed by agreement for the delivery of the sugar. *Held*:—Thereupon the plaintiff's right of action accrued to compel the payment of the price.

APPEAL from the Second District Court of New Orleans, *Lea, J. Dufour*, for plaintiff. *R. H. Barker*, for defendant and appellant.

OGDEN, J. The defendant being sued for the price of forty-eight hogsheads of sugar, admits in his answer that he did agree to purchase the sugar at the price for which he is sued, but avers that he was deceived in regard to the quality of it by the false representations of the plaintiff. The defence is not sustained by any evidence in the record. The other points relied on by the defendant, to obtain a reversal of the judgment of the Court below, are 1st.: That the plaintiff sues for the price without having delivered the thing sold. 2d. That the judgment is erroneous, because it does not decree a stay of execution until the delivery of the sugar. Neither of these points are tenable. The plaintiff offered to deliver the sugar, and placed the defendant in default by giving him a written notice to attend on the day fixed by the agreement for the delivery of the sugar—thereupon the plaintiff's right of action accrued to compel the payment of the price. Civil Code, Art. 2529. The right of the defendant to claim the sugar, or the proceeds of the sale of it, which it appears was made with consent of parties under order of the Court, is reserved in the judgment appealed from, and we see no reason to disturb the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs.

Rehearing refused.

JOHN KELLAR v. HENRY W. PALFREY.

The Supreme Court is without jurisdiction when the matter in dispute does not exceed three hundred dollars.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J. J. D. Mix*, for plaintiff and appellant. *Benjamin & Micou*, for defendant.

VOORHIES, J. The defendant having issued an execution on a judgment rendered in his favor by the late Commercial Court of New Orleans against the plaintiff for the sum of one hundred and seventy dollars, with interest and costs, allowing as a credit the sum of fifteen dollars, the latter sued out an injunction on the ground that the judgment was extinguished by compensation, averring that he was the transferee of a judgment rendered by the same court in favor of *Mrs. Cora Slocum* against the plaintiff for the sum of three hundred and ninety-three dollars, together with interest and costs.

From a copy of his judgment, annexed to but forming no part of the record, it appears that the defendant is entitled to recover five per cent. per annum in-

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terest from the 15th of July, 1839, until paid, and three dollars costs of protest, and the costs of suit. The writ of injunction was issued on the 14th of June, 1852. Allowing interest to that date, and three dollars, the cost of protest, there being no allegation or evidence as to the costs of suit, the whole amount called for by the execution would not exceed two hundred and ninety dollars.

The extinguishment of the defendant's judgment by compensation is the only matter in dispute.

"The Supreme Court, except in the cases hereafter provided, shall have appellate jurisdiction only; which jurisdiction shall extend to all cases when the matter in dispute shall exceed three hundred dollars," &c. Con., Art. 62. The same provision existed in the former Constitution, Art. 63.

We concur in opinion with our predecessors, that "the framers of the Constitution wisely provided a limit to the jurisdiction of this Court, that litigants for small matters might not be burdened by onerous costs, or harassed by protracted litigation. This wise policy it is our duty to enforce; and parties who are dissatisfied with the decrees of inferior tribunals must exhibit affirmatively their right to our interference." *Plique v. Bellome*, 2 An. 293.

It is, therefore, ordered, that the appeal be dismissed.

WILLIAM BONNER v. JOHN H. BAKER.

No valid auction sale of real estate can be made when the description of the property sold is vague and indefinite.

To make a valid auction sale of immovables and slaves, the authority given by the owner to the auctioneer should be in writing—as also the conditions on which the sale is to be made.

APPEAL from the District Court, Third District, Parish of Jefferson, *Clarke, J. V. F. & J. B. Cotton*, for plaintiff. *Lavergne*, for defendant and appellant.

VOORHIES, J. This suit is instituted by *William Bonner* in his own name and as agent of *George Purglove*, to compel the defendant to execute a conveyance to them for four lots of ground, which they allege were offered by him for sale, for cash, at auction, on the 8th of May, 1852, and adjudicated to them by *John P. Phillips*, as auctioneer.

The defendant, in his answer, has excepted to the joinder of actions, and pleaded the general issue.

Whether the trial on the merits in the Court *à qua*, without noticing the exception, operated as an abandonment or waiver of it on the part of the defendant, as urged by the plaintiffs, we consider immaterial for us to determine, as we have come to a conclusion on the merits.

The only evidence on the merits, as exhibited by the record, consists of the testimony of *L. R. Kinny*, a memorandum purporting to be a proces-verbal of the auctioneer, and a publication of the sale of 18 lots of ground in the village of Mechanicsham, in squares Nos. 8, 9 and 24. The description of the squares is the only description given of the lots, and it is not stated to whom they belonged. The terms of sale announced, namely, "one-fourth cash; balance at 6,

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v.
BAKER.

12 and 18 months; a mortgage on the property to secure payment," are entirely different from those alleged in the petition. There is no averment or proof of the payment of the price of adjudication. The memorandum of the auctioneer is in the following words, viz :

"Sales at auction of four lots of ground in the village of Mechanicsham, Parish of Jefferson, Louisiana, by order and on account of *Mr. John H. Baker*, by *J. P. Phillips*. *R. Armfield*, auc't at Bank's Arcade, Magazine street, on Saturday the 8th May, 1852.

<i>George Purglooe</i> , Lot No. 1, - - - - -	\$250 00
Do. do. do. No. 2, - - - - -	235 00
<i>William Bonner</i> , do. Nos. 7 & 8, \$85, - - - - -	170 00
	<hr/> \$655 00

Charges, commissions and State Taxes, 3 per cent., - - - - -	\$22 60
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Advertising, - - - - -	5 50
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\$28 10

New Orleans, 13th May, 1852.

(Signed) R. ARMFIELD, Auctioneer.

Rec'd payment of comss. & taxes from *L. B. Kinny*, Notary Public, N. Orleans, 13th May, 1852.

(Signed) J. P. PHILLIPS."

The statement of facts contained in this instrument, does not, in our opinion, meet the requirements of law to constitute a valid procès-verbal of sale. The auctioneer, in his procès-verbal, should give an exact description of the property conveyed, the price of adjudication, and the terms of sale. The description of the lots in question is so vague and indefinite that it is utterly impossible to designate those adjudicated to the plaintiffs out of the eighteen advertized for sale. The testimony of *Mr. Kinny* we consider immaterial. He says, "he was at the Arcade when the property described in plaintiff's petition was offered for sale, and adjudicated to plaintiff. Defendant was also present and made no objections."

Under this state of facts the adjudication, tested by the provisions of our Code, was clearly illegal and void. In relation to auction sales of immovables and slaves, the law requires that the authority given by the vendor to the auctioneer should be in writing, as well as the conditions on which such sales are made. C. C. Art. 25, 84. No such authority appears to have been given in this case. In the case of *Pew v. Livaudais*, 8 L. R. 460, the Court held : — "We have no hesitation to say, that as another part of the Code, Articles 2255-6, requires the assent of the parties to a sale of real estate to be written, unless the party, against whom the sale is sought to be enforced, admits it, we cannot recognize any validity in an auction sale of real property the owner of which did not authorize or assent to in writing, and does not admit his assent otherwise." The same principle is also recognized in the case of *Short v. Knight*, 15 L. R. 484. In that case the adjudication was held to be null and void, on the ground of the absence of written evidence of any authority given by the defendant to the auctioneer to sell the lot.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that judgment be rendered in favor of the defendant, with costs in both Courts.

SLIDELL, C. J. I wish to be considered as putting my concurrence in our decree, upon the ground of the uncertainty as to the thing sold, not deeming it indispensable to express an opinion on the other point.

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J. T. B. FEATHERSTONE v. THOMAS A. COMPTON et al., McDOWELL,
MILLS & Co., Garnishees.

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Decision in *Scott v. Duke, Killgore v. Planters Bank, and Commercial Bank v. Markham*, 8 A., affirmed.

It is competent for the garnishee to plead all defences which may be necessary for the protection of his own interest. Of such a nature is a plea which shows that the plaintiff cannot recover against him, because the law, under which he is proceeding against the defendant, is repealed.

APPEAL from the First District Court of New Orleans, *Larue, J. Duncan & Redmond*, for plaintiff and appellant. *Stockton & Steele*, for garnishees.

BUCHANAN, J. This is an appeal by plaintiff from a judgment of the District Court discharging a garnishee from liability to satisfy a judgment of which the plaintiff is assignee, obtained in the year 1840 in the State of Mississippi. This Mississippi judgment was made executory by an order of the Ninth Judicial District Court of Louisiana, sitting in Concordia, in the year 1842. A writ of *fiery facias* was directed from the Ninth District Court to the Sheriff of the parish of Orleans, on the 31st December, 1851, (page 51 of the record,) and under this *fi. fa.* the sheriff of Orleans seized, on the 11th February, 1852, in the hands of *McDowell, Mills & Co.* all moneys, credits, &c., belonging to defendant, *Thomas A. Compton*. Interrogatories were propounded on the same day to the garnishees, which they have answered by acknowledging an indebtedness to *Compton* individually, but averring that they are creditors to a far larger amount of a commercial firm of which *Compton* is the principal partner. The plaintiff ruled garnishees to shew cause why they should not pay the amount into Court which they acknowledged to be due to *Compton* individually. On hearing, the Judge below discharged the rule.

The first point made in the cause by the counsel of appellees is, that the proceedings against their clients are unauthorized by law and void.

The article 746 of the Code of Practice provided, that when a creditor has obtained against his debtor a judgment having the force of *res judicata* in another State of the Union, or in a foreign country, he might execute such judgment by having the property of his debtor seized and sold by executory process, without previous citation, in the same manner as on privileged or mortgaged debts contained in acts importing confession of judgment.

But by Act of 1st June, 1846, (Session Acts, page 166,) it was declared that so much of the above mentioned article of the Code of Practice as authorizes a creditor, having obtained a judgment in another State of the Union, or in a foreign country, to proceed by executory process on said judgment, was repealed.

In three cases decided by the late Supreme Court, in the same year, and reported in 3d Annual Reports, it was held, that the effect of this repealing law was to arrest proceedings, even when commenced. In the first of those cases *Scott v. Duke*, the order of seizure and sale was granted by the District Court

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v.
COMPTON ET AL.

of Tensas, in December, 1845, upon a judgment rendered in Alabama. The appeal was taken in December, 1847. The language of the Supreme Court, in deciding the case, is: "When the appeal was taken in this case, the law authorizing the executory process had been repealed, and the order of seizure had become inoperative in consequence of that repeal." The facts were substantially the same in the two cases of *Killgore v. Planters Bank*, and *Commercial Bank v. Markham*, which affirmed the decision in the case of *Scott v. Duke*.

Those cases are decisive of the present one. Their authority does not seem to have been called in question in the five years that have elapsed since their decision, and we see no reason for questioning it at this time. It is, indeed, insisted with much earnestness by the counsel of appellant, that it is for the defendant alone to plead the illegality of the executory process, and that this is a matter with which the garnishee has no concern. We are of the opinion that it is competent for the garnishee to plead all defences which may be necessary for the protection of his own interest. Of that nature is a plea which shows that the plaintiff cannot recover against him, because the law, under which he is proceeding, has been repealed.

Judgment affirmed.

Rehearing refused.

C. E. METCALF v. J. S. CLARK—MARGARET B. CLARK, opponent.

Property purchased with the paraphernal funds of the wife is her separate property—and not liable for the debts of the community.

It is not necessary that an investment of paraphernal funds in the name of the wife should appear, as such, in the act by which the property is acquired. The wife, in all cases, would be bound to show the reality of the sale to her *déhors* the act—and the same proof would be necessary in order to make the acknowledgment in the act binding upon her.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. A. N. Ogden*, for plaintiff and appellant. *Haynes and Rand*, for defendants.

VOORHIES, J.* *Margaret B. Sprout*, wife of the defendant, and her sister *Mary Ann Sprout*, claiming the ownership of the lots of ground seized in this case, as the the property of the defendant, have enjoined the sale.

By agreement of the parties in the record, the contestation is limited to the claim of *Mrs. Clark*. From the judgment rendered in her favor perpetuating the injunction, the plaintiff has appealed.

The property in controversy was purchased by *Mrs. Clark* and her sister, *Mary Ann Sprout*, through the agency of *Charles H. Kellogg*, from the estate of *Robert Layton*, of whose last will *Judge Preston* was one of the executors, for the price of \$3010, partly in cash and partly on terms of credit. This sum it is proved, was paid out of the share inherited by the vendees from the estate of *James Brown*, of whose last will *Judge Preston* was also the executor. Thus it is shown that the paraphernal funds of *Mrs. Clark*, with which her share of the price was paid, never came into the possession of her husband.

* OGDEN, J., did not sit in this case, having been of counsel when the case was submitted.

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CLARK.

Assuming it to be proved that the price was paid out of her paraphernal funds, yet it is contended by the plaintiff that, as regards creditors, she has no right to claim the property as her separate property, and that it is consequently liable to seizure for the debts contracted by the husband as the head and master of the community. We do not think so—but, on the contrary, consider the reverse as settled by our jurisprudence.

In *Dominguez v. Lee et al*, 17 L. R. 295, which is one of the leading cases on the subject, the learned Judge, who delivered the opinion of the Court, remarked: "It is true, as a general rule, that the law considers to be common property that which is acquired by the husband and wife during the marriage, although the purchase be only in the name of one of the two, and not of both. C. C, 2371; 10 L. R, 148. The reason is that, in that case, the period of time when the purchase is made is alone attended to, and not the person who made it. But we are not ready to say that no distinction ought to be made when the property is clearly shown to have been bought with the separate funds of one of the parties, and particularly with funds of the wife which never came under the administration of the husband. 1 L. R, 523. It is a well settled doctrine in our jurisprudence, that money received during the marriage, even by the husband on account of the wife, does not fall in the community, but remains her separate property, 7 L. R, 292. According to article 2363 of the Louisiana Code, the wife has the right to administer her paraphernal property, without the assistance of her husband; and by article 2315, paraphernal property is considered as the separate property of the wife. There necessarily results from these provisions of the law a power allowed to the wife to administer alone her paraphernal estate, as she pleases; and a right to alienate her separate property and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, provided she does it with the authorization of her husband."

The next is the case of *Terrell v. Cutrer*, 1 R. R, 367, in which the same principle is not only affirmed, but extended further in favor of the wife. In that case the husband was in possession of the paraphernal funds of the wife, which he applied to the payment of the price of the property conveyed to her. The Court held, that as the wife has at any time the right to resume the administration of her paraphernal property, there was no necessity to prove that she had the actual administration at the time she appropriated part of it to the purchase of the slave with her husband's consent. That act alone was one of administration, and was done with the consent of the husband."

The same doctrine was again affirmed in other cases. See 4 R. R, 194; 2 An. 980; 5 An. 611. A careful consideration of the different provisions of our Code on the subject, would, it seems to us, remove any doubt on our minds, if any existed, as to the correctness of the principle thus settled by our predecessors. Under article 2421 of our Code, a contract of sale between husband and wife is declared to be valid, "when the transfer to the wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated." If the paraphernal funds of the wife may be thus invested in regard to the husband, we are at a loss to discover why the same rule should not be applicable to all cases.

But it is urged that the investment of the paraphernal funds should be expressed in the act by which the wife acquires the property. The objection does not appear to us to be founded in law. In regard to creditors, such a statement

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would of itself be without effect, except in giving notice to third persons. But as the husband is the head and master of the community, having alone the administration, a purchase in the name of the wife would not be in the usual course of business, and consequently would be sufficient to put third persons upon enquiry. As this rule seems to be applicable to promissory notes signed by the wife, we see no reason why it should not be equally applicable to other contracts entered into by her. The wife, if required, would be bound in all cases to establish the reality of the sale to her *dehors* the act; and the same proof would also be necessary in order to make her acknowledgment in the act binding upon her.

We deem it unnecessary to determine whether the wife could purchase on credit; as, it suffices to say, that she had then under her separate administration sufficient funds of her own with which the price of the property has been paid. As the evidence in the record would, in our opinion, bind her, if the property had diminished in value, or totally perished, it is but just to conclude that she should be entitled to hold it in her own right as an investment of her paraphernal funds.

Considering this as one of the cases in which creditors have a right to enquire into the validity of the wife's title, and no malice is shown, we are of opinion that the appellee is not entitled to the damages claimed by her.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs in both Courts.

THE STATE, ON THE RELATION OF JOHN L. HENLY, *v.* M. M. REYNOLDS,
JUDGE OF THE FOURTH DISTRICT COURT OF NEW ORLEANS—AND
THOMAS GILMORE, CLERK.

The supervisory power of the Supreme Court, through writs of Mandamus, is limited to those cases where its exercise is incidental to and in furtherance of its appellate jurisdiction.

VOORHIES, J. The facts, on which the application for a mandamus in this cause is based, are these: The relator, *John Henly*, in his capacity of Sheriff of Harrison county, Mississippi, held in his possession, under process of attachment at the suit of *Butterworth*, certain slaves seized as the property of *David Myers*. Whilst in his custody they were clandestinely taken away and removed to this State. Meanwhile *Claiborn Myers*, having obtained a judgment in the Fourth District Court of New Orleans, caused an execution to issue directed to the Sheriff of Rapides, which was levied on the slaves in question. The relator then filed a petition of third opposition, claiming the slaves thus illegally taken from his custody, and enjoining the Sheriff's sale. From the judgment rendered in his favor, *Claiborn Myers* took a suspensive appeal, giving bond and security in the sum of \$500, as fixed by the order of the Judge. The relator objected, that the amount of the bond was insufficient to entitle the appellant to a suspensive appeal; and now complains that both the Clerk and the District Judge have refused to grant him a writ of possession.

The jurisdiction of this Court, in relation to the subject matter under consideration, is hardly distinguishable from the jurisdiction of the Supreme Court

under the constitution of 1845; both have appellate jurisdiction only, except in cases specially enumerated. The jurisdiction of the first Supreme Court was also invested with the same limited powers. What was therefore held by them on similar questions, may be considered as having the authority of precedent. In the Succession of *Whipple*, 2 An., 237, the Court said: "We have not a general supervising power and control over Courts of inferior jurisdiction. Our supervising power, through the writs of mandamus and prohibition, is limited to those cases where its exercise is incidental to and in furtherance of our appellate jurisdiction." The question was also fully examined and considered in another case reported in 2 An., 979, in which the Court says: "The Supreme Court derives its jurisdiction from the constitution, by which it is declared to be appellate. Its powers are commensurate with its jurisdiction, and the Court has uniformly refused to exercise a general supervisory control over the proceedings of the inferior tribunals, and can interpose its authority only when necessary for the exercise of its appellate jurisdiction." See *exparte Bujol*, 3 An., 716, affirming those decisions.

We are of opinion that this case comes clearly within the principle of the decisions in the cases quoted; and that the relief or remedy sought by the relator is not necessary for the exercise of our jurisdiction, or such as to authorize our interposition.

The mandamus is, therefore, refused.

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JUDGE FOURTH
DISTRICT COURT,
NEW ORLEANS.

MRS. P. W. ROUNTREE v. BRILLIANT STEAMBOAT COMPANY.

Permission for a slave to serve on a particular steamboat does not warrant his employment on another, without the consent of the owner.

A PPEAL from the Third District Court of New Orleans. *Kennedy, J. Hunter and Bradford*, for plaintiff. *Goold*, for defendant and appellant.

SLIDELL, C. J. The evidence in this cause satisfactorily establishes the following facts: that the slave *Jesse* was the property of the plaintiff; that he was worth the amount awarded by the judgment below; that he was received on board the steamboat of the defendant's in the capacity of a cabin servant, and carried up the river, without the consent of the plaintiff, and without her knowledge; that near Plaquemines the boilers of the steamboat exploded; that the slave was badly scalded and otherwise wounded; was taken ashore in an apparently dying condition, and soon after died.

The evidence is so clear as to the occasion, and the severity of the injuries which befel the slave, that the appellant has not attempted to dispute them: but has, at much length, argued that the consequent death of the slave has not been proved. Two witnesses, who had deposed as to his condition on their personal knowledge, were permitted, without objection, to testify that they "understood" afterwards he died from the scalding and other wounds. We do not think the appellant here can call upon us to disregard this testimony entirely, because it is hearsay. His acquiescence in its admission may naturally have led the plaintiff to abstain from offering further evidence, to show that the apparently dying condition in which witnesses saw the slave after the explosion, was

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actually followed soon after by his death. We do not say if a judgment came before us resting wholly on hearsay evidence received below without objection, we should feel bound to affirm it. It is unnecessary to push the inquiry to that extent. Here is a case where hearsay evidence is accompanied by direct and unexceptionable testimony, strongly indicating the probability of its truth. Besides, the objection comes with a bad grace from the defendants, whose business it was, having taken away the slave without the owner's consent, to bring him back, or account for him.

Upon the question of the defendant's liability, we find no difficulty. The purpose and scope of the statute is a stern and stringent protection of this class of property from loss, by the bad faith or negligence of those engaged in the navigation of water courses. The consent of the master of the slave is scrupulously exacted; the liability for damages, if the slave is carried without the master's consent, is clear. See the Statutes of 1816, 1835, p. 152, 1840, p. 89. It is true the plaintiff had given her consent to the employment of the slave on another steamboat; but the proof is satisfactory that she was ignorant of his discharge from that boat; and that as soon as he was discharged, he applied for service on board the defendant's vessel. The officer who employed him knew who his owner was, and his previous employment on board the Natchez, but asked him for no pass or authorization from his owner, although he acknowledges he knew it was the rule on all boats not to hire slaves without a pass or permission. The consent that the slave should serve on board a particular boat, does not excuse the absence of a consent to his employment elsewhere.

Judgment affirmed, with costs.

THE STATE v. WILLIAM FOSTER.

The plea of *autrefois convict* is a special plea in bar of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful upon a sufficient indictment.

Where the indictment alleges that the prisoner had fled from justice, the proclamation of the Governor offering a reward for his apprehension, was admissible in evidence to sustain the allegation.

Where the mortal stroke is given in this State, but the death occurs in the State of Mississippi, the crime may be prosecuted in the parish where the mortal stroke was given.

When the wound was inflicted on board of a vessel in Lake Borgne, but moored to a wharf in the parish of St. Bernard, the Courts of that parish can entertain jurisdiction over the offender.

A PPEAL from the First District Court of New Orleans. *Larue, J. Attorney General*, for the State. *Ducros*, for the defendant.

BUCHANAN, J. The defendant was indicted in the parish of St. Bernard, for the murder of *Clement Nicaise*, alleged to have been committed on the 5th November, 1850. He was found guilty of manslaughter, and, on appeal to this Court the judgment was arrested, "without prejudice to a legal prosecution for the crime of manslaughter." See the decision of this Court, delivered at the April term of 1852, not yet reported.

In pursuance of this decree an indictment for manslaughter was laid before the Grand Jury in St. Bernard, who found a true bill at the June term of 1852. A second conviction having ensued, the defendant again prosecutes an appeal before this tribunal, and prays that the judgment be arrested on the following grounds:

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v.
FOSTER.

1st. That the Court below set aside the plea of "autrefois convict," on a mere motion of which the accused was not even informed, and by an *ex parte* order.

2d. That the proclamation of the Governor was improperly admitted in evidence before the jury, to prove the absconding of the defendant.

3d. That the indictment does not describe the place of the death of *Clement Nicaise* with sufficient certainty, inasmuch as it says "he died on Lake Borgne," without specifying in what State or jurisdiction he died.

4th. That the Court erred in refusing to charge the jury that if they found it proved that the mortal wound was inflicted in a schooner, on Lake Borgne, they must acquit the prisoner.

1. Upon the first of these points, the record shows that defendant pleaded to his indictment on the 8th of June, 1852, in writing. His plea was the general issue, to which, upon the same paper, was added a plea of *autrefois convict*, in the following words: "And the said *William Foster* further says, that, though not guilty, he has already been convicted for the same alleged offence, and sentenced to the Penitentiary by this honorable Court, in the last term of this Court, and consequently he pleads *autrefois convict*, which he is ready to verify."

To this plea the District Attorney demurred, as follows: "That to maintain the plea of *autrefois convict*, the crime must not only be the same for which the defendant was before convicted; but the conviction must have been lawful, and on a sufficient indictment. In the present case, the conviction was on an indictment clearly insufficient to sustain the verdict for manslaughter, more than a year having elapsed between the commission of the crime and the prosecution. The District Attorney, therefore, demurs to said plea, alleging for cause of demurrer that the facts are insufficient in law to bar the present prosecution, and prays the judgment of the Court, overruling and rejecting the plea of *autrefois convict*."

This demurrer appears to have been disposed of on the same day that it was filed. The entry in the minutes is as follows: "On motion of the District Attorney, it is ordered by the Court that the plea of *autrefois convict* be set aside." This order is asserted to have been made *ex parte*, and in the absence of the defendant's counsel. But the contrary is to be inferred, from the fact that the entry in the record immediately preceding the sustaining of the demurrer, and in the same day's proceedings, is a motion of defendant's counsel to be allowed to amend his plea, which was granted. A demurrer to a plea admits the facts, and is to be decided by the Court, and not by the jury; and we are satisfied that the plea was in this instance properly overruled. The plea of *autrefois convict* is a special plea in bar of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful upon a sufficient indictment. Chitty's Com. Law, vol. 1, p. 461. 9 East's Rep., 441.

But the judgment was arrested upon the previous conviction in this case, precisely upon the ground that the indictment was insufficient to support a conviction for manslaughter, for want of the allegation that the accused had fled from justice, more than a year having elapsed from the commission of the offence to the finding of the bill of indictment.

2. Upon the second ground of error, we are of opinion that the proclamation of the Governor was properly received in evidence, as a circumstance tending to sustain the allegation of this indictment, that defendant had fled from justice—

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an allegation necessary to justify a prosecution for manslaughter, under the circumstances.

3. The former decision of this Court in this case, above mentioned, has passed upon the third of defendant's grounds of error, in express terms. In that decision, it is said: "The common law, adopted by our act of 1805, was modified by the statute of 2d *George*, which provides that when the stroke has been given in England, and the death occurs out of England, or the reverse, the killing may be inquired of in that part of England where either the death or stroke shall happen respectively. 1 East., Pleas of the Crown. And so the late Court of Errors and Appeals in Criminal Cases held, in the case of *State v. McCoy* and others: "That when the mortal stroke was given in this State, but the death occurred in the State of Mississippi, the crime might be prosecuted in the parish where the mortal stroke was given." 8 Rob. Rep., 545. It was proper, therefore, to charge in the indictment the truth, that the death occurred on Lake Borgne, and it was immaterial whether it occurred within the jurisdiction of Louisiana, Mississippi or on the high-seas, within the jurisdiction of the United States."

We entirely concur in the view taken of this point by our predecessors.

4. The fourth point of error assigned, appears to us to involve a question of fact, and, as such, to be excluded from our appellate jurisdiction in criminal cases, by Article 62 of the Constitution. The indictment charges that the wound which caused the death of *Clement Nicaise*, was inflicted in the parish of St. Bernard. From the appellant's bill of exceptions, it appears that the Judge was requested to charge the jury that if they were of opinion, from the evidence that the mortal wound was inflicted on *Clement Nicaise*, while in a schooner on Lake Borgne, where there is always water at the lowest tide, the accused must be acquitted. And for the purpose, apparently, of sustaining this bill of exceptions, a part of the cross-examination of one witness has been taken in writing by the request of defendant's counsel, and sent up with the record. The question of the territorial limits of the parish of St. Bernard is probably a question of law; but the question of the place where the mortal wound was given, is undoubtedly a question of fact. We are of opinion that in the case supposed by the Judge, in the bill of exceptions, that although the wound was given on board a schooner on Lake Borgne, yet the schooner being moored to a wharf, was in the parish of St. Bernard—the Judge did not err in refusing the charge. But whether or not the schooner was at such a point as described, is a question of fact, into which we cannot inquire.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

JOEL SMALL v. HENRY BONNABEL — CHARLES A. JACOBS, Warrantor.

Parties who obstruct the use of the public road are liable in damages.

APPEAL from the District Court, Third District, Parish of Jefferson. *Clarke, J. Jourdan*, for plaintiff. *Schmidt*, for defendant and appellant.

VOORHIES, J. The plaintiff has cumulated several demands in this action. He alleges that the defendant has, within the year, illegally taken possession of

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part of his land fronting on the bayou Metairie; that on the portion thus taken, which forms a part of the public road, the defendant has cut a canal and erected a fence, whereby he is deprived of the use of said road and bayou, greatly to his damage; that he and the other proprietors of the Metairie are interested, for the benefit of their property, to have the use of the whole width of said road; that said bayou is public for all persons, and its free access, which is highly beneficial to him, is thereby interrupted; and that the defendant's boundary, according to his titles, does not extend to the South side of said bayou. He, therefore, prays that the defendant's boundary be accordingly established; that he be condemned to restore to plaintiff, and to the public use, the land thus unlawfully taken by him; that he be condemned to remove his fence from said land, and ordered to fill up said canal; and in default of so doing, that the same be done by the proper officer, at his cost and charge; and that he be condemned to pay the plaintiff five thousand dollars damages.

The defendant, after pleading the general issue, avers that the present boundaries of his land have been established, and exist unchanged, from time immemorial; that the plaintiff's action is barred by the prescription of ten, twenty, and thirty years. He further avers that the plaintiff has, for a long time, encroached upon and appropriated to his own use a portion of said public road, and the only road by which the defendant has ingress to and egress from his land, in consequence of which he has sustained three thousand dollars damages, for which he prays judgment; and also prays that *Charles A. Jacobs*, his vendor, may be cited in warranty, &c.

Charles A. Jacobs, in his answer, avers that according to the metes and bounds assigned to the property conveyed by him to the defendant, and made with reference to the sheriff's deed of sale, no liability whatever attaches to him in relation to the subject matter in dispute.

Upon these pleadings, and the evidence adduced by the parties, this case was submitted to a jury, who rendered a verdict in favor of the plaintiff against the defendant, and in favor of the latter against his warrantor. This verdict was set aside, and a new trial granted. On the second trial the jury rendered the following verdict: "We, of the jury, find for the plaintiff that his title extends to bayou Metairie, and find one thousand dollars damages for plaintiff, and that the defendant move his fence to the North side of the bayou Metairie, and that the space of sixty feet on the South side be kept open for a public road, and in demand in warranty, we find in favor of the warrantor." From the judgment rendered thereon, after fruitless efforts to obtain a new trial, the defendant has appealed.

The record shows that *Pierre Langliche*, from whom all the parties derive their titles, originally owned a tract of land containing twenty arpents front on each side of the bayou Metairie, which he acquired by purchase from *Andres Almonaster y Rosas*, on the 1st of October, 1787. On the 24th of January, 1793, *Langliche* conveyed to *Joseph Beaulien* a portion of this land, containing three arpents on each side of said bayou. On the 24th of January, 1800, he also conveyed to *Louis Forneret* nine arpents front on the South side of said bayou. In the conveyance, the land is described as fronting the road—"Nueve arpanes de frente al camino, orillando el bajou." There is no evidence of the divestiture of *Forneret's* title. It appears from the recital in the act of sale from the estate of *François Dorville*, père, deceased, to *François Dorville*, made on the 24th of August, 1824, that the deceased acquired the same tract of

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land from *Joseph Deville Degoulin Bellechasse*, on the 29th of July, 1807. On the third of June, 1834, it was sold at public auction as the joint property of *François Dorville*, deceased, and *Jean Baptiste Auzignac Dorville*, and purchased by *Samuel Moore*, who conveyed the same, on the 26th February, 1836, to *Joseph Kenton*, from whom the plaintiff purchased three arpents front of said tract. Subsequently, the plaintiff purchased three arpents front from *Mrs. Wm. J. Johnson*, making six arpents front on the South or East of bayou Metairie, as claimed by him. There is no evidence in the record showing any conveyance of the three arpents from *Kenton* to *Mrs. Johnson*; but in the deed of sale from her to the plaintiff, it is stated that she acquired the same from *Kenton* by authentic act, passed before the same Notary on the 18th of June, 1843. Be it as it may, it is considered immaterial to the decision of this case. And here it may be proper to remark, that in all the mesne conveyance to which we have referred, the land in question is invariably described as fronting on the bayou, except in the conveyance from *Langliche* to *Forneret*.

The lots of ground claimed by the defendant constituted a part of the tract of land of seventeen arpents front on the North side of the bayou Metairie, which *Jacobs* purchased from *Angélique Aury* on the 22d of March, 1836. The latter acquired the same by inheritance, and by virtue of the last will of her mother, *Adélaïde Demony*, who acquired the same under the last will of her husband, *Pierre Langliche*.

It appears that *Jacobs* had previously conveyed this land to *Courval*, *Giraud*, *Pardon* and *Bonnabel*, the defendant, describing it as fronting on the North side of the bayou Metairie. Afterwards, it was seized, advertised and sold by the sheriff, under an order of seizure and sale at the suit of *Charles A. Jacobs*, to whom it was adjudicated, and by whom the same was divided into lots, four of which were purchased by the defendant, on the 28th of May, 1839. In the description of these lots an error is alleged to have been committed. We consider this immaterial.

Considering the evidence in connection with the admissions of the parties in the proceedings, we do not think the jury have erred in their conclusion as to the public road; and it is clearly shown that the defendant's canal and fence are on the same.

Under this state of facts, it is obvious that the defendant has not committed any trespass on the plaintiff's land. But the object of this action seems to be substantially the abatement of a nuisance, which the plaintiff has clearly the right to maintain. See *Herbert v. Benson*, 2 An.

The only question, therefore, which remains for our consideration, is the question relative to the damages. Is the plaintiff entitled to recover any? If so, what amount? The act of the defendant, obstructing the use of the public road, was clearly illegal. "Every act whatever, of man, that causes damage to another, obliges him by whose fault it happened to repair it." C. C., 2294. From a careful examination of the evidence in relation to the damages, we have not been able to concur with the jury in their conclusion. One of the witnesses testifies that he would assess the damages sustained by plaintiff at from \$1000 to \$2000. Another witness says that "a fence made between his house and the bayou, in violation of his rights, would injure his property one-fourth of its value." Other witnesses testify that they consider the injury sustained by plaintiff in consequence of being deprived of the use of the bayou, to be equal to one-half of the value of his property. The estimates thus made were evi-

dently based upon the hypothesis that the canal and road were to remain permanent fixtures. It is not shown that the plaintiff has sustained any specific damages. *Woodworth*, one of the witnesses, says: "Access to the water in the bayou was a great advantage to the place. Knows that *Mr. Canton* had to dig a well twenty or thirty feet to have water. He would not give fifty dollars for all the lands on both sides of the bayou." On the whole, we think the evidence insufficient to justify us in allowing any damages to the plaintiff.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, so far as it condemns the defendant to pay damages, and in all other respects affirmed, and that the costs of the appeal be paid by the appellee.

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THE STATE, ON THE RELATION OF *N. TREPAGNIER v. F. M. CROZAT*.

The duration of an office which is held by executive appointment, and having no term fixed, can be filled at the pleasure of the Executive, is not enlarged by Article 96 of the Constitution of 1845, which provides that "the duration of all offices, not fixed by this Constitution, shall never exceed four years." This Article is a restriction upon the Legislature, and applies to those offices which were held either during good behavior, or for a longer term than four years. It does not enlarge the tenure of an office held by the will of the Governor.

The Act of April 10, 1811, provides that "for the parish of Orleans there shall be for the city of New Orleans an office of record of births and deaths, whereof the officer shall be appointed by the Governor." An office, thus created, is held during the pleasure of the appointing power. That appointing power was, originally, the Governor, and it is doubtful whether the Constitution of 1812, (Sec. 2, of Art. 3,) making the Senate a component part of the appointing power as to officers established by that Constitution, and whose appointment was not therein otherwise provided for, made any change in the mode of appointing the Recorder of Births and Deaths. (BUCHANAN, J.)

Whether the appointing power be vested in the Governor alone, or in the Governor and Senate, by the terms of the law creating the office of Recorder of Births and Deaths, it is an office *durante bene placito*. No term of duration was fixed by the Statute creating the office, and when such is the case, the office is not to be taken, or intended as an office during good behavior, but an office during pleasure. (BUCHANAN, J.)

Article 96 of the Constitution of 1845 has nothing to do with offices, of which the tenure, under the law creating them, was *during pleasure*. That Article limits the duration of offices held during good behavior to four years. The tenure, *during pleasure*, is not susceptible of limitation, as it is subject to the will of the appointing power. (BUCHANAN, J.)

APPEAL from the First District Court of New Orleans. *Larue, J. Warfield and Dufour*, for plaintiffs, cited, *ex parte Hennen*, 18 Peters, 259; *Nicholson* and another v. *Thompson* and another, 5 Rob., 367; *The State v. Percy*, 5 A., 282; *Kelly v. Gilly*, 5 A. 534. *Roselius* and *J. W. Collins*, for defendant and appellant.

OGDEN, J. The office of Recorder of Births and Deaths was not established by the Constitution; it was created by an Act of the Legislature in 1811, and the power of appointment by that act was given to the Governor, and no limitation of the term of offices fixed. The Article 47 of the Constitution contains a proviso in the following words: "Provided, however, that the Legislature shall have a right to prescribe the mode of appointment to all other officers established by law." The power of the Governor to make the present appointment is derived from the Act of the Legislature of 1811, creating the office. Under the authority of the cases cited by the counsel for the appellee, there can be no doubt the Governor could rightfully cause the office of the appellant to cease,

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by the appointment of the Relator, with the consent of the Senate, for the reason that the Statute creating the office has fixed no term for its duration, unless there is some other law by which his power is restricted. Such a law is supposed by the counsel for defendant to exist in Article 96 of the Constitution of 1845, the effect of which, it is contended, was to make the office in question an office of four years fixed duration. The terms of that Article are as follows: "The duration of all offices not fixed by this Constitution shall never exceed four years." I consider that one of the objects of this Article was to limit the power of the Legislature, and also that from its terms it was applicable to those existing offices which were either held during good behavior, or for a term longer than four years, and that consequently it produced no enlarging effect upon the tenure of the office now in question, which was held at the pleasure of the Executive.

I am of opinion that the tenure of the office of Recorder of Births and Deaths has always been at the pleasure of the Executive, and that the Relator was legally appointed.

SLIDELL, C. J., VOORHIES, J., and CAMPBELL, J., concurring in the above opinion of OGDEN, J.

All the Judges being of opinion that the judgment should be affirmed, it is, therefore, decreed that the judgment of the District Court be affirmed, with costs.

BUCHANAN, J. The office of Recorder of Births and Deaths was created by the act of April 10, 1811, in the following words:

"For the parish of Orleans, there shall be for the city of New Orleans, an office of record of births and deaths, whereof the officer shall be appointed by the Governor."

I am of opinion that this office, thus created, was an office during the pleasure of the appointing power. That appointing power was, originally, the Governor alone. It admits of doubt whether the Constitution of 1812 made any change in that respect. The Section 9 of Article 3 of that Constitution made the Senate a component part of the appointing power, as to offices established by that Constitution, and whose appointment was not therein otherwise provided for. The Constitution of 1845, Article 50, and the Constitution of 1852, Article 47, have repeated the Section 9, Article 3, of the Constitution of 1812, *totidem verbis*.

The practice, however, seems to have been that appointments of Recorder of Births and Deaths in New Orleans were made by the Governor and Senate. Accordingly, the three commissions in this record, issued by as many Governors, two to the respondent and one to the Relator, are all "by and with the advice and consent of the Senate."

Whether the appointing power in this instance be vested in the Governor alone, or in the Governor and Senate, I hold it to be clear that by the terms of the law creating the office, it is an office *durante bene placito*. No term of duration was fixed by the Statute creating the office, and the Supreme Court expressly decided in the case of *Nicholson v. Thompson*, 5th Robinson's Reps., that when such was the case, the office was not to be taken or intended as an office during good behavior, but an office during pleasure.

The respondent relies upon the Article 96 of the Constitution of 1845, as giving him the right to hold this office for the full term of four years from the date of his commission, which is the 16th February, 1850.

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But, in my judgment, that Article has nothing to do with offices, of which the tenure, under the law creating them, enacted previous to that Constitution, was *during pleasure*. The Article reads as follows: "The duration of all offices not fixed by this Constitution shall never exceed four years."

The effect of that Article was to diminish, not to augment, the term of office. Accordingly, our predecessors, in the case of the State on the relation of *Baudoin v. Percy*, reported in 5th Annual Reports, decided that the commission of a Notary Public, granted in 1839, should be held to expire in four years from the going into effect of the Constitution of 1845. But the office of Notary Public, under the Statute of 1818, which created it, was an office *during good behavior*. It was properly held that the Article 96 of the Constitution of 1845, applied to that office, and curtailed its duration to four years, counting not retrospectively, but from the going into effect of the Constitution. The tenure during pleasure, is the very opposite of that during good behavior. Its duration is unsusceptible of being curtailed, because, from its very nature, it is arbitrary, and subjected to the will of the appointing power.

Taking this view of the question, I deem the argument of the counsel of defendant, drawn from the 23d Article of the Civil Code, to be inapplicable to the present case. The Article 96 of the Constitution of 1845 has not been copied in the Constitution of 1852. The omission of the limitation of the duration of offices may be viewed as, in some sense, a repeal, *pro tanto*, of the Constitution of 1845; although, in truth, it is a want of precision in language to speak of that Constitution as repealed. It is, in the words of Article 142 of the present Constitution, *superceded* by the latter instrument, as well in those Articles which are copied, as in those which are omitted. But the learned counsel says that the limitation of the duration of offices, by Article 96, was inconsistent with the Act of 1811 creating the Recorder of Births and Deaths, in New Orleans; and, by being so inconsistent, the effect was to repeal the Act of 1811. He proceeds to contend that the omission of the article of limitation in the Constitution of 1852, was tantamount to a repeal of a repealing act, which, by our legislation, does not revive the first act. The conclusion is sound, but the premises are defective. The Article 96 of the Constitution of 1845 is not inconsistent with the Act of 1811, according to my view, as above expressed; and, therefore, I hold the Act of 1811 to be in full force. The office of Recorder of Births and Deaths was, originally, and has never ceased to be, an office held during the pleasure of the Executive.

I am, therefore, of opinion that the judgment of the District Court should be affirmed.

LEWIS BOND v. SAMUEL B. FROST AND OWNERS OF THE STEAMBOAT
CONCORDIA.

In an action against a common carrier for damages to goods, the proof must be clear and certain, to relieve him from liability, that the damages did not arise while the goods were in his hands; for the presumption is against him, not only from the terms of the bill of lading, but from the policy of law. In suits against common carriers the testimony in their behalf of their clerks and servants, must be received with great caution.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Hammer*, for plaintiff. *Bonford*, for defendants and appellants.

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CAMPBELL, J. This suit was instituted for the recovery of damages, alleged to have been sustained by plaintiff on a shipment of ninety bales of cotton.

The steamer *Naomi* received the cotton in Hatchee river, and stipulated, in a clear bill of lading, to deliver it to the consignees, *Felix Walker & Co.*, in New Orleans, "they paying freight at two dollars per bale and charges, with privilege of re-shipping." On the 14th March, 1850, this cotton was re-shipped at Memphis, by the *Naomi*, on the steamer *Concordia*. She undertook, by her bill of lading, (in which it was expressed that the cotton was in good order and condition,) to deliver it at the port of New Orleans, in like good order and condition, upon consignees paying freight at the rate of one dollar per bale, and charges, amounting to \$106 87.

Upon the arrival of the cotton at the port of New Orleans, it was ascertained that fifty bales were damaged. The consignees received the cotton, except five bales, which the carrier retained and subsequently sold, without the consent of the owner, to reimburse the freight and charges, the consignee having refused to pay them, in consequence of the damage done to the cotton.

The plaintiff's claim for damages is based upon the non-delivery of five bales of cotton, expenses incurred in picking and preparing for market the fifty damaged bales, loss of cotton in picking, etc., as set forth in a statement annexed to his petition.

On the first trial of this cause, in February, 1851, before the Fifth District Court, judgment was rendered in favor of the plaintiff for three hundred and seventy-three dollars and fifty-nine cents. From this judgment the defendant appealed. After a careful examination of the facts disclosed by the record, the Supreme Court, in effect, held that even though it be admitted that the recital in the bill of lading is not conclusive against the vessel, and that the carrier may be permitted to go behind it, and prove that the condition of the cotton, at the time of its receipt, was different from what is recited in the bill of lading, yet that the policy of law, a policy—as was well said—justified by long experience, not only throws the burden of proof upon the carrier, but holds him to a strict accountability, and will not permit him either to qualify or evade the effect of his written acknowledgment in the bill of lading, except upon evidence the most clear and convincing; in the correctness of which opinion we fully concur.

Being of opinion, however, that there was not sufficient evidence to establish the correctness of the charge of two hundred and five dollars and fifty-six cents, for loss of weight in picking fifty bales damaged cotton—there being no proof of the value of the cotton picked out, or that it was necessarily taken out as damaged cotton—the judgment of the District Court was reversed, and the case remanded for a new trial. 6 An., 808.

On the second trial, a number of the most intelligent merchants of the city were examined, who stated that it is the uniform usage among the cotton factors of the city, when cotton consigned to them is so much damaged that it will not "dry out," to send it to the pickeries, that the damaged cotton may be removed, and the rest repacked. They further state that it is the uniform usage for the picker to retain as part of the price the damaged cotton; and, though in the opinion of some of them, this mode of remuneration is objectionable, they regard it as the only feasible plan that can be adopted.

The custom is universally recognized, and the defendants, knowing as they must have done, that in accordance with established usage, the cotton would be

sent to the pickery, if they knew a better mode of rendering it merchantable, should have pointed it out.

In reference to the amount charged for picking and re-baling the damaged cotton, we concur in the opinion arrived at by the District Judge, who says:

"Various witnesses, conversant with the cotton trade in this city, have been examined as to what is a reasonable charge for taking to pieces, airing and re-baling cotton, partially damaged, in bales. They concur in stating that the price charged in this instance, (one dollar per bale,) is below the usual price. *Mr. Hill*, an eminent merchant of long standing and experience in the cotton trade in this city, declares, that he has constantly paid \$1 50 per bale, allowing the pickers to keep the damaged cotton; that if he required the picker to account for the damaged cotton, he would consider it reasonable to allow at least double, or \$3 per bale, for his services. In the present case, the damaged cotton retained by the picker was thirty-four pounds per bale. The cotton was shipped afterwards to Liverpool, and invoiced at six cents per pound. At that rate, the damaged cotton yielded the picker two dollars and four cents per bale, or one hundred and two dollars for the fifty bales, picked, dried and re-baled. The charge made by the picker was one dollar, with the privilege of retaining the damaged cotton. But by making him account for its proceeds, we find, as above, that this cotton has yielded him three dollars and four cents per bale. This only exceeds, by two dollars, for the whole fifty bales, what *Mr. Hill* calls a minimum price for picking and rebaling. The further light thrown upon the case by the additional evidence, only will justify, if any, a reduction of two dollars on plaintiff's claim."

The doubt expressed by the Court in remanding the case for a new trial, resulting from the want of proof of the value of the pickings, and of the necessity of taking such a number of pounds from the bales, is resolved by the exhibition of the invoice of the damaged cotton, and the testimony of *Mr. Hill*, from which it appears that the cotton was worth six cents per pound to the picker, and that thirty-four pounds (the weight lost per bale by picking,) is a small average for cotton that is damaged enough to be picked.

After a careful examination of all the testimony adduced, we are of opinion that the defendants have failed to establish, with sufficient certainty, that the damage to the cotton complained of, (and which is fully proved,) was sustained before the cotton was received on board the *Concordia*. They may have created a doubt on this subject; perhaps rendered it probable; but have by no means made it certain; and we deem this certainty of proof necessary to rebut the presumptions of law against the carrier, presumptions which arise, not from the terms of the bill of lading alone, but from the policy of law.

This rule may doubtless, in some instances, operate with severity, but, as was said by *Chief Justice Holt*, in a case somewhat analagous, "This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust those sort of persons, that they may be safe in their ways of dealing."

The Supreme Court, as has been shown, concurred in that portion of the judgment of the lower Court which recognized the liability of the defendants for the damage to the cotton. On the new trial, however, the whole case being again open, additional evidence was introduced. The witnesses of plaintiff, all of whom appear to be familiar with the cotton business, being either factors,

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cotton brokers, or pickers, concur generally in the opinion that the damage was recent.

The only additional testimony offered by the defendants to prove that the damage did not happen on the *Concordia*, is found in the depositions of *Joseph D. Phelps* and *Samuel David*, both servants of the owners of the *Concordia*, the one being a clerk, the other mate. They give it as their opinion that the damage was an old one, and could not, therefore, have occurred on the *Concordia*.

Without intending to disregard the testimony of these witnesses, on the ground of their being servants of the defendants—for we give to their testimony all the consideration which can properly be claimed for it—we deem it proper to state that we receive it with the allowance implied by the opinion of *Best*, C. J., in the case of *Riley v. Horn*, 5 Bing., 217, (15 Com. Law R., 428,) in which he states that “When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends a servant with them to the place of destination. If they should be lost, or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier’s servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.”

We think proper to add that, as the care of the cotton on board the *Concordia* was distinctly at issue on the former trial, it is an unsatisfactory circumstance that the evidence as to the particular place where the cotton was stowed was not brought forward until the second trial.

The defendants having failed to establish satisfactorily that the cotton was damaged when received on board the *Concordia*, the judgment of the District Court is affirmed, with costs.

ROUSSELOT & LANGOUMOIS v. JOHN P. KIRWIN AND WARDENS OF THE
CHURCH OF ST. LOUIS, OF NEW ORLEANS.

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In a building contract, in which it was provided that the contractor should be paid thirty thousand dollars, at the rate of twenty-five hundred dollars per month, on the certificate of the architect stating that the work done warranted the payment—it is incompetent for the sub-contractor who claims from the owner, under the Act of 1844, on the ground that the payments have been anticipated—to go behind the architect’s certificate to show that it did not state the truth.

The Act of 1844, in its terms and spirit, protects the sub-contractor, or workman, against all payments in anticipation made by the proprietor to the undertaker of a building, subsequent to the delivery of an attested account.

APPEAL from the Second District Court of New Orleans, *Loa*, J. *J. W. Collins*, for plaintiffs. *Benjamin & Micou*, for Wardens Church of St. Louis, appellants.

BUCHANAN, J. The plaintiffs allege that they are carpenters and sub-contractors under the defendant, *Kirwin*, in the execution of work done by the latter for the other defendants, the religious corporation of the Wardens of the Church of St. Louis, of New Orleans; that *Kirwin* is indebted to them for work done upon said contract, to the amount of \$7,280 dollars. They allege, further, that they have served an attested account upon the Church Wardens

on the 19th April, 1850; that *Kirwin* made no opposition to said account; and that the Church Wardens have made payments to *Kirwin*, in anticipation of their contract with him, by reason whereof they are bound to discharge the plaintiff's demand.

The plaintiffs had judgment in the District Court against the defendants, *in solido*, for the sum of four thousand one hundred and sixty dollars, with interest. From this judgment the Church Wardens have appealed.

The Act of 18th March, 1844, upon which this suit is founded, so far as the Church Wardens are concerned, ordains as follows:

"Every mechanic, workman or other person, doing or performing any work towards the erection, construction, or finishing of any building in this State, erected under a contract between the owner and builder or other person, whether such work shall be performed as journeyman, laborer, cartman, sub-contractor or otherwise, and whose demand for work and labor done and performed towards the erection of such building has not been paid and satisfied, may deliver to the owner of such building an attested account of the amount and value of the work and labor thus performed and remaining unpaid, and thereupon such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing the same."

And again, in the sixth section of said Act:

"If, by collusion or otherwise, the owner of any building erected by contract as aforesaid, shall pay to his contractor any money in advance of the sum due on said contract, and if the amount still due the contractor, after such payment has been made, shall be insufficient to satisfy the demand made for work and labor done and performed, or materials furnished, the owner shall be liable to the amount that would have been due at the time of his receiving the account of such work, in the same manner as if no payment had been made."

The appellants are sought to be made liable to the appellees under the last recited section.

There were two building contracts passed between the appellants and *John P. Kirwin*; one dated the 12th of March, 1849, and the other the 22d June, 1849. By the first of these contracts, *Kirwin* obliged himself to do certain work upon the Cathedral in this city, within the delay of fourteen months from the date of the contract, for the price and sum of seventy-seven thousand dollars, payable, thirty thousand dollars during the progress of the work, at the rate of twenty-five hundred dollars per month, on the certificate of the architect, stating that the work done warrants the said payment; and the balance, \$47,000, in two, three, four, five, six, seven and eight years from date of delivery and acceptance of the work, in bonds bearing interest, and secured by mortgage. The same contract further provides that should any extra work be done, it should be paid for, *proportionally, in the same manner as the said sum of seventy-seven thousand dollars.*

The contract of the 22d June, 1849, is for certain additional work to be done upon the Cathedral, for which the Church Wardens agreed to pay *Kirwin* the sum of nineteen thousand dollars, in bonds of one thousand dollars each, delivered to the said *Kirwin* as the works progress, and on the certificates of the architect, approved by the building committee, stating that the work done warrants the delivery, and in the following manner, to-wit: seven thousand dollars when the walls shall be raised to level of the second floor; seven thousand dol-

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lars when the walls shall be raised to their proper height; and the balance when the flooring, flagging and pews shall be completed and accepted, the whole in said bonds.

The payments made by the Church Wardens under the contract of the 12th March, 1849, were as follows: In April, May, June, July, August, September, October, November and December, 1849, and January, 1850, ten months, \$2500 each month, say, - - - - - \$25,000

Under the contract of June 22, 1849, they paid him, in August, 1849, 7,000
And in October, 1849, - - - - - 7,000

Total, - - - - - \$39,000

The specifications of the petition, in relation to the anticipation of payments, are as follows: "That for the work under the first contract, the payments made amounted to more than the thirty seventy-sevenths of the work actually done; and that for the work under the second contract, the second payment, \$7,000, was made before the completion of the walls, which are, in fact, not yet finished, (May, 1850.)"

As to the first of these specifications, it appears to us untenable. We cannot concur in the construction which the counsel of plaintiffs has given to the contract on this point. The expressions of the contract of the 12th March, 1849, in relation to the mode in which payments are to be made, are imperfectly given. They have been already quoted in this opinion. Twenty-five hundred dollars were to be paid monthly, from the commencement of the work for twelve months, on the certificate of the architect that the work done warranted the said payment. These monthly payments were accordingly made for ten consecutive months, upon as many certificates of the architect *that the work done warranted the payment*. The apparent meaning of this phrase is that there was work done, at the date of each certificate, to the value of twenty-five hundred dollars since the last certificate. The brief of plaintiffs' counsel, however, presents us with an equation, by which it is demonstrated that the monthly work done should have been of the value of six thousand four hundred and sixteen dollars, instead of twenty-five hundred dollars, in order to entitle *Kirwin* to his certificate. The whole of this argument rests upon the word "proportionally," quoted above, as occurring in another clause of the same contract. In that clause, which relates to prospective extra work of an uncertain amount, it is agreed that the payments shall be made in the same way, *proportionally*, as for the contract work; that is to say, as we understand it, the whole amount of such extra work shall be divided into two portions, of which one shall be paid in monthly instalments of cash, and the other in bonds.

We consider the convention of the parties to have been an absolute one for the payment of the sum of twenty-five hundred dollars per month, provided the architect gave his certificate that there was such an amount of work done. We are further of opinion that the appellants are protected in such payment by the certificate of the architect, and that it is incompetent for the plaintiffs to go behind that certificate, and to show that it did not state the truth. The record even shows that plaintiffs benefitted by these periodical payments to *Kirwin*, for it exhibits a long list of cash payments from *Kirwin* to plaintiffs, amounting in the aggregate to \$3,000, and extending through the period embraced in the monthly payments of cash from the appellants to *Kirwin*. We think the payments under the contract of 12th March, 1849, were not anticipated.

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In relation to the second instalment, \$7,000, paid under the contract of 22d June, 1849, we find but one sentence in the testimony which directly touches it. *Depouilly*, a witness of plaintiffs, and the architect charged with the superintendence of the work, says "witness does not recollect whether he approved any warrants in relation to the walls contracted for in the second contract." The defendants appear, however, to be absolved from the necessity of proving that the payment was made upon the certificate of the architect and building committee, inasmuch as the petition of plaintiffs alleges that such certificates were given for all the payments, by collusion.

No witness mentions whether or not the walls were raised to their proper height at the time the second instalment upon the contract of the 22d June was paid. That payment was made in October, 1849. The work of *Kirwin* progressed for some three months after that payment, until the 19th January, 1850, when the tower fell, dragging down with it a portion of the walls, or injuring them so that they had to be in part rebuilt. On the 5th April, 1850, a contract of compromise was entered into between the Church Wardens and *Kirwin*, in which it is recited that the value of the walls fallen down, and those necessary to be pulled down by reason of the fall of the tower, had been fixed by appraisers, mutually chosen, at \$7,890; that the other injuries to the building amounted to \$1,800, which, with other items specified, made a total of \$10,080; that the parties had agreed to divide this damage, and, accordingly, *Kirwin* bound himself to repair the damage for \$5,040.

On the 26th April, 1850, the Church Wardens sued out an injunction to prohibit *Kirwin* from the farther prosecution of his work upon the Cathedral, alleging that he was using bad materials, &c. This injunction was, after hearing the evidence, made perpetual.

The plaintiffs had not filed an attested account with the Church Wardens at the time of the payment of the second instalment of the contract of 22d June, 1849. In fact, they did not file such account until six months after that payment, to wit: on the 19th April, 1850. In the meantime, *Kirwin* had been at work for three months, until the fall of the tower. The evidence leaves us entirely in the dark as to the point to which the raising of the walls had progressed, either at the time of the payment, (October, 1849,) or at the time of the fall of the tower and interruption of the work, (January, 1850.) We understand the law quoted in the commencement of this opinion, to be, in its terms and spirit, a protection of the sub-contractor or workman, against all payments in anticipation made by the proprietor to the undertaker of a building, *subsequent* to the delivery of an attested account. Even supposing the walls had not been raised to their proper height at the time the second instalment was paid, yet if that work were done afterwards, and before the delivery of the attested account of plaintiffs, the payment must be considered as made in due time. The delivery of the attested account fixes the right of the parties, at the time of such delivery. It does not relate back to any previous time. The question to be solved is, was the second instalment due to *Kirwin*, under his contract with the Wardens, on, or before the 19th April, 1850? The Supreme Court held in the case of *Hale v. Wills*, 8d Annual Reports, which is the leading case on the construction of the Building Act of 1844, that sub-contractors and material men, employed by the undertaker, hold, as against the owner, under the building contract, and not beyond that contract.

The plaintiffs rely greatly, if not principally, upon the allegations made by

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the Church Wardens against *Kirwin*, in their suit against him, of which all the proceedings, including the evidence, are in evidence in this suit.

It is true, the Church Wardens have alleged that *Kirwin's* work was defective in every respect, and that some of the walls erected by him were out of plumb, and required to be taken down and rebuilt. But this establishes no claim on the part of plaintiffs against the Church Wardens. The intention of the Act of 1844 is not that the owner shall be punished for the bad workmanship of his builder. He paid for a good wall. The wall turned out to be bad, or was injured by the bad workmanship of the tower, and its consequent fall. We cannot thence infer bad faith or collusion on the part of the owner.

A careful examination of the evidence has failed in convincing us, that the payment of the second instalment of the building contract, of the 22d June, was anticipated, or that said instalment was not properly demandable, under the said contract, previous to the delivery of the attested account of plaintiffs to the Church Wardens.

Judgment of the District Court reversed, and judgment is hereby rendered in favor of defendants and appellants, the Church Wardens of the Church of St. Louis of New Orleans, and against the plaintiffs and appellees, with costs in both Courts.

ROSA GOMEZ, wife of P. E. BARBE, v. M. COURCELLE.

The decision in *Alexander v. Jacobs*, 5 M. 692, was made before the adoption of the Code of Practice, and is not law now. The Code of Practice (arts. 68, 69,) not only defines the hypothecary action, but declares under what circumstances it may be enforced, and no where is it laid down that when mortgaged property has been seized and sold, the mortgagee, before proceeding against the third possessor, must first bring suit against the seizing creditor to obtain payment out of the proceeds of the object he has sold.

It is not necessary before proceeding against the third possessor of mortgaged property, for the hypothecary creditor to shew that a *fi. fa.* has been sued out against the debtor and a return of *nulla bona* made.

The law accords priority to the oldest mortgage, and a sale under a younger tacit mortgage does not defeat the older. The property affected passes *cum onore*, and the vendee receives it burthened with its prior incumbrance.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Price & Denegre*, for plaintiff. *Seghers*, for defendant and appellant.

CAMPBELL, J. This is an hypothecary action, instituted by *Rosa Gomez*, with the assistance of her husband *P. E. Barbe*, on a judgment in her favor for twelve hundred and ninety-two dollars and interest, rendered against her father, in his capacity as tutor, in November, 1851.

Having in vain demanded payment of her judgment from her father, she now seeks to subject to her tacit mortgage a lot of ground in the possession of the defendant, *M. Courcelle*. This lot is situated on Dumain, between Robertson and Claiborne streets, and is part of a larger lot purchased by her tutor, *Joseph F. Gomez*, from the corporation of New Orleans, August 31, 1829.

It may here be premised that *Gomez* was married to the mother of plaintiff in April, 1828, who died in 1830, leaving the plaintiff, sole issue of her marriage.

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In August, 1833, *Gomez* was appointed tutor of plaintiff, and in this capacity received for her, from the succession of *Jacques Guesmon* the sum of twelve hundred and ninety-two dollars, which sum, thus received, was the basis of the judgment against her tutor, on which this action is founded.

To the demand of plaintiff, defendant pleads the general denial, and in further defence urges, 1st. That having purchased the lot described from one *Blois*, who acquired it at a Sheriff's sale made to satisfy a tacit mortgage—that the same property cannot be subjected to another tacit mortgage, until the judgment, under which the sale was made shall first have been annulled by a direct action. 2d. That this action cannot be maintained, inasmuch as no *fi. fa.* was ever issued and no return of *nulla bona* was ever made in the suit of the present plaintiff against *Gomez*, in which her tacit mortgage was recognized; and 3d. That the debtor, *Gomez*, owns other property which should first be discussed.

Defendant likewise pleads, as a peremptory exception to plaintiff's demand, that his rights against the mortgaged property in his possession cannot be enforced until he shall first have brought suit against *Thomas Blois*, to make him refund the proceeds of the sale in the case of *Blois v. Roux*. This exception is based on the ruling of the Court in the case of *Alexander v. Jacobs*, 5 M., 632. This decision was made long before the adoption of the Code of Practice, and in our opinion the rule is not applicable to the case now before us. The Code of Practice, in articles 68 and 69 not only defines this hypothecary action, but declares under what circumstances it may be enforced, and no where do we find it laid down that when mortgaged property has been seized and sold the mortgagee, before proceeding against the third possessor, must first bring suit against the seizing creditor to obtain judgment out of the proceeds of the object by him sold. See art. 16 C. P. 708, 9, 10 et seq.

This practice, so far as we are apprized, has never prevailed since the adoption of the Code.

We will next proceed to consider those objections urged in the answers, and 1st. That no *fi. fa.* or return of *nulla bona*, has been exhibited.

Although this point is urged with much earnestness by counsel, we are aware of no rule of law which renders it necessary. To maintain the hypothecary action it is sufficient that amicable demand of the hypothecary debt be made of the debtor for thirty days, and that the third possessor be notified ten days of such demand. Code of Practice, art. 69. The record discloses that this requirement has, in both respects, been fully complied with.

As regards that part of the defence in which defendant, as vendee of *Blois*, contends that the property cannot be subjected to the tacit mortgage of plaintiff until the judgment, in the case of *Blois v. Gomez*, shall first have been annulled, it is only necessary to state, that the legal mortgage in favor of plaintiff attached in August, 1833, *Gomez*, her tutor, being then the owner of the property. That in favor of *Blois* in 1841, *Gomez* having on the 20th September of that year sold the same property to *Roux*, who at that time was tutor to the minor *Thomas Blois*, by means of which tutorship the second tacit mortgage attached. Thus both tacit mortgages attached to the same property. But the law accords priority to the oldest mortgage. A sale under the younger does therefore defeat the older mortgage. The property affected passed *cum onore*, and the vendee received it burthened with its prior incumbrances.

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It is further urged that, in 1833, *Gomez*, the hypothecary debtor, purchased a lot of ground on Mysterious street, which is subject to plaintiff's mortgage; and likewise that he acquired in 1829, by purchase from the city of New Orleans, a lot of ground adjacent to that owned by himself, the title to which never has been divested by a decree of any competent Court; wherefore he claims that these lots be first discussed.

This demand is made under the provisions of art. 715 of the Code of Practice, which provides that, "the purchaser against whom a suit is commenced by a creditor having a legal or judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other property which the debtor has in his possession, and even that which he has alienated since the purchase, because the creditor who has a general mortgage can only act against the property of which his debtor has disposed, in the order in which the alienations have been made, beginning at the most recent and ascending to the most ancient."

It may here be remarked that the record, in the matter of the succession of *Rosa Guesnon*, mother of plaintiff, and the record of the suit for partition between *Blois* and *Gomez*, though offered in evidence in the Court below, form no part of the transcript, they having been mislaid since the trial.

To supply this defect, the parties have agreed that the statements of facts contained in their briefs are true. Page 4 of plaintiff's printed brief contains the following statement: "As to the lot of ground situated on Dumain street, and adjoining the defendant's property, this Court decreed the same to be the property of the present plaintiff, by inheritance from her mother, *Rosa R. Guesnon*, the said portion being her share in the community property acquired during her marriage with *Gomez*." This admission alone, we would regard conclusive on this point of the case; but it is proper to observe, that defendant in his printed argument asserts that *Gomez* is yet the legal possessor of the lot to which, it is contended, the tacit mortgage of plaintiff attaches, inasmuch as he never has sold it; which he maintains is the true meaning of the word "alienation," used in article 715 of the Code of Practice. We regard this as a mere deduction of counsel and not the assertion of specific fact, and must, therefore, under the agreement, give to the statement of plaintiff's counsel above quoted, the effect of an established fact. The opinion at which we have arrived, viz: that the lot in question was owned by plaintiff and by her inherited from her deceased mother, is strengthened by the record, which discloses that it was brought by her as dowry in marriage, and was subsequently, in conformity with a judgment of the Third District Court, rendered on article 2341 of the Civil Code, sold as her property.

This lot, then, was never affected by plaintiff's mortgage, and we have seen that the lot acquired from *Guesnon Brothers* was alienated by *Gomez* long before the purchase of *Blois*, defendant's vendor. *Gomez*, the hypothecary debtor, having failed to pay the judgment of plaintiff, and the lot in defendant's possession being the last property disposed of by him, suit was properly brought to subject it to the tacit mortgage of plaintiff.

The conclusion to which we have arrived on the facts disclosed by the record above detailed, renders it unnecessary for us to decide upon the effect of the failure of defendant to furnish a sum sufficient to pay the costs of discussion.

Judgment affirmed.

THOMAS O'BRIEN *v* PATRICK FLYNN.

The evidence of one witness is sufficient to prove payment of a pre-existing obligation, even exceeding five hundred dollars: the rule of evidence contained in article 2257 of the Civil Code, being applicable to the proof of contracts, not to the proof of the extinction of contracts.

APPEAL from the District Court, Third District, Parish of Jefferson, *Clarke, J. G. B. Duncan*, for plaintiff. *Marks*, for defendant and appellant.

BUCHANAN, J. The plaintiff sues upon a note made by the defendant on the 29th June, 1851, for sixteen hundred dollars, payable on demand to the plaintiff or his order.

The suit was instituted the 8th April, 1852. Defendant pleaded payment. He has proved by one witness that six hundred dollars were paid by defendant's wife to plaintiff, on account of this note, on the same day that it was made. The witness declared that it was he himself who drew the note, and that it was given in settlement of a partnership account between the parties, in jobs of ditching and canalling, which were entirely finished before the note was given.

There was also proof of a sum of one thousand dollars having been received by plaintiff for account of defendant from a third party.

The District Judge seems to have been of opinion that, as each of these payments exceeded five hundred dollars, and as they were only proved by one witness each, the proof was insufficient under the 2257th article of the Code. He accordingly gave judgment in favor of plaintiff for the amount claimed: but on motion, granted a new trial, to enable defendant to procure corroborative proof. On this new trial, the defendant offered an additional witness, who swore to an acknowledgment having been made in his presence by plaintiff to defendant of the receipt of those two sums of six hundred and of one thousand dollars respectively. The District Judge appears to have attached no credit to the testimony of this witness, for he again rendered judgment in favor of plaintiff for the full amount claimed.

We had not the advantage, like our brother in the District Court, of seeing the witnesses; but agree with the counsel of plaintiff and appellee, that there are circumstances of suspicion apparent upon the face of the evidence of *Michael Erwin*. He testifies that he was *passing by* the Louisiana Hotel, where plaintiff and defendant were standing, on the 2d or 3d November, 1851—heard defendant ask plaintiff if he had received one thousand dollars from *Egana*. Plaintiff answered that he had. Defendant asked him if he received six hundred dollars from *Mr. Sullivan*. Plaintiff answered, he had. Defendant then told plaintiff, I want my note. Plaintiff said he had not the note with him then; that his wife had it, and that defendant could get it at any time. All this conversation was heard, if we may believe this witness, by a person who was merely passing by two persons standing together in the street, one of whom at least, (the plaintiff,) he declares was a stranger to him; and is detailed with the utmost minuteness of time, place and circumstance, seven months afterwards. This Court has often had occasion to declare testimony of confessions of the party to be the weakest kind of proof; and we are free to confess that the present instance offers, in our estimation, no exception to that general rule. The evidence of *Erwin* has produced no effect whatever upon our minds, as it

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produced none upon that of the Judge of the District Court. But there remains the positive evidence of one witness (*Sullivan*) as to the payment of six hundred dollars, on account of this note. We are of opinion that the evidence of one witness is sufficient to prove a payment of a pre-existing obligation, even exceeding five hundred dollars: the rule of evidence contained in article 2257 of the Civil Code, being applicable to the proof of contracts, not to the proof of the extinction of contracts. See *Ferry v. LeGras*, 5 M. R. 398; *Armor v. Huie*, 14 L. R. 846; *Palmer v. Dinn*, 2 Annual R. 536.

It is further shown, by legal evidence, that the defendant was engaged in making a canal upon *Johnson's* plantation, of which *J. Y. de Egaña* was agent; that plaintiff collected of *Egaña*, on the 19th September, 1851, one thousand dollars (whether as defendant's agent or as his partner, does not very clearly appear); that he refunded to defendant's wife eight hundred dollars of the money so collected; and that defendant sanctioned the payment to his wife.

If we add the two hundred dollars, balance of the thousand received from *Egaña*, to the six hundred proved by *Sullivan*, we have proof of eight hundred dollars received by plaintiff on account of defendant, since the date of the note sued upon; and which, in the lack of proof of any other claim of plaintiff against defendant, we think should be credited upon said note.

It is, therefore, decreed, that the judgment of the Court below be reversed, and that plaintiff recover of defendant eight hundred dollars, with legal interest from the judicial demand (10th April, 1852,) until paid, and costs of the Court of the first instance; the costs of appeal to be borne by the appellee.

THE STATE v. JOHN KENTUCK, a slave.

Where the record shows an appointment by the Court of an attorney to defend the accused, the Supreme Court will not inquire whether such attorney has been duly licensed to practice law.

In an indictment against a slave under the 54th section of the Act of June 7, 1806, it is not necessary to charge the intent with which the act was done.

On the trial of slaves in the tribunals established for that purpose, the law does not require an observance of the technical rules which regulate criminal proceedings in the higher Courts.

A PPEAL from Justices Court, Parish of Jefferson. *Marks*, for appellant. *Attorney General*, for the State.

CAMPBELL, J. This appeal is taken from a sentence of death pronounced against *John Kentuck*, a slave, by a tribunal of the parish of Jefferson, composed of Justices of the Peace and slaveholders, organized under the act of June 1st, 1846, "relative to trials of slaves."

The accused is charged with having on the 20th November, 1852, in the parish of Jefferson, made a violent and felonious assault with a knife on one *L. A. Dimur*, a white man, and with grievously and wilfully wounding, beating and cutting him.

The counsel who conducts the defence in this Court, urges a reversal of the judgment on the ground that, although the record shows the appointment by the Court, of the first instance, of an attorney to defend the accused, yet that the fact is not as stated—the person appointed never having been licensed by this Court.

This is a matter into which we cannot inquire. The record states that an attorney was assigned the prisoner, and we must presume that an attorney of the Court was appointed. THE STATE
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It is next assigned as error that the information exhibited by the District Attorney does not follow the Statute, in charging the intent with which the act was done.

This was not necessary. The accusation was not framed nor was the prisoner convicted either under the 6th section of the Act of 1843, or the 3d section of the Act of 1814, which prescribe penalties for assaults with the intent to kill, but under the clause of the 54th section of the Act of June 7, 1806, which denounces the death penalty against "any slave who shall have grievously and wilfully wounded or mutilated any white person."

The law moreover does not demand on the trial of slaves, in the tribunals established for that purpose, an observance of the technical rules which regulate criminal proceedings in the higher courts. "A brief statement of the accusation in writing," is all that is required, and the Act of 1846, under which this prosecution was conducted, expressly declares that "no proceedings had in accordance with it, shall be annulled or impeded by any error of form."

The last allegation of error is, that "the Court that tried the accused was without jurisdiction."

The counsel has not seen proper to state why the Court was without jurisdiction, or are we able to discover his reason. The record shows that the offence charged was committed by a slave, in the parish of Jefferson, and that the tribunal which tried him sat in that parish, and was constituted in conformity with the law "relative to the trial of slaves."

Judgment affirmed.

DIGGS, MCKEEVER & CO., v. JESSE R. KIRKLAND & CO., AND LOWE, PATTISON & CO.—TAYLOR & RICHARDSON, Interveners.

One who is employed by plaintiffs at a fixed salary—but who was to have one-third of the profits, if the one-third exceeded his salary—is a competent witness.

APPEAL from the Second District Court of New Orleans, *Lea, J. Halsey* and *H. H. Strawbridge*, for plaintiffs and appellants. *Clark, McConnell*, and *Bayne*, for defendants and intervenors.

VOORHIES, J.* The plaintiffs sue on an accepted draft drawn by *J. R. Kirkland & Co.*, of Brandon, Mississippi, on *Lowe, Pattison & Co.*, of New Orleans, for the sum of \$1500, duly protested for non-payment by the acceptors, of which the drawers were duly notified. They also claim of *J. R. Kirkland & Co.*, the sum of \$2250 03, for goods invoiced and shipped to them, including an item of \$134 37, as the balance due them by the firm of *J. R. Kirkland & Brother*, as stated in the account annexed to their petition, at the foot of which the following credit is noted :

* OGDEN, J., did not sit in this case, having been of counsel when the case was submitted.

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"By their draft on and accepted by *Lowe, Pattison & Co.*, protested, \$1500."

Under a writ of attachment, sued out by the plaintiffs, the Sheriff seized two hogsheads of sugar, which were afterwards bonded by *Taylor & Richardson*, intervenors, who claimed the ownership thereof.

D. J. Phelps, W. H. Wright, and Wright, Williams & Co., were garnisheed. But their answers to the interrogatories propounded to them by the plaintiffs, fully exonerate them from any liability.

The defendants, *J. R. Kirkland & Co.*, claim the sum of \$889 45, as a balance resulting in their favor from two drafts drawn by them in October, 1851, on *Wright, Williams & Co.*, each for the sum of \$1500, after crediting plaintiffs with the amount of invoices charged in their account.

It is proper we should here notice a bill of exceptions found in the record. On the trial the testimony of *Edward Duncan* was objected to on the score of interest. This witness stated, on his *voir dire*, that he was employed by plaintiffs at a fixed salary, but if one-third of the profits exceeded his salary, then he was to receive said profits in lieu thereof. The objection, we think, was properly overruled by the District Judge. The interest was contingent and too remote, in our opinion, to exclude the witness; it was such an interest as could only affect his credibility. According to the construction given to the provisions of our Code in relation to the competency of witnesses, it is clear that the interest which legally excludes a witness must be the prospect of gaining an advantage or profit by the judgment in the cause in which he may be called upon to testify, and which would be an immediate consequence of such judgment. 4 L. R. 201; 18 *ibid.* 360; 5 N. S. In the case of *Burke v. Breazeale et al*, 1 R. R. 74, it was held, that although a witness was entitled to ten per cent. commission on the amount recovered for his fee as an attorney, yet he was a competent witness.

It is urged that the drafts on *Wright, Williams & Co.*, have been improperly and illegally imputed to the payment of the plaintiffs' claim against *J. R. Kirkland & Brother*. When the firm of *J. R. Kirkland & Brother* was superseded by that of *J. R. Kirkland & Co.*, which was composed of the same partners, with the addition of *Richardson*, it was indebted to the plaintiffs in a balance of \$184 87, as stated in the account referred to in the testimony of *Edward Duncan*. This balance resulted after allowing *J. R. Kirkland & Brother*, as credits, the two drafts of \$1500 each, one on *Lowe, Pattison & Co.*, and the other on *Wright, Williams & Co.* *J. R. Kirkland & Co.* in their answer expressly declare that as the draft on *Lowe, Pattison & Co.* was not paid by the acceptor, it therefore created no indebtedness, and limited their demand to the two drafts on *Wright, Williams & Co.* As the draft on *Lowe, Pattison & Co.* had already been credited to the account of *J. R. Kirkland & Brother*, it was evidently credited in error to the account of *J. R. Kirkland & Co.*, as stated by the witness *Duncan*. The draft on *Wright, Williams & Co.*, unaccounted for, should, we think, have been credited to this account. The testimony of *Michael Duncan* shows, that he went to Brandon, Mississippi, in December, 1851, when he there presented to *J. R. Kirkland & Co.* plaintiffs' account; *Richardson* was present in the store when he presented it to *H. Kirkland*, who said that they were not then able to pay it, but that he or his brother would go to the city in the course of two or three weeks, and would settle it. He saw *J. R. Kirkland* in the evening. No objections were made, by any of the parties, to the account presented by him, which he left with *J. R. Kirkland & Co.* Why

have not *J. R. Kirkland & Co.* produced this account? It was certainly ap-
 proved, and we may fairly presume it was identical with the one under con-
 sideration. In their letter to the plaintiffs of the 10th March, 1852, they say:
 "You were aware of our having been burnt out, and you must have known
 that it required some little time to arrange our business. We had a desire to
 settle our account with you, and all other of our creditors, at the earliest pos-
 sible moment, but there is little or no money in the country, and we are unable
 to make collections at present, and, consequently, we are unable to liquidate
 our debts until collections are made. We have just learned from *Messrs.*
Richardson & Taylor that you had collected a part of the debt due you by at-
 taching some goods belonging to them." From the tenor of this letter they
 evidently considered themselves indebted to the plaintiffs when this suit was in-
 stituted; and it is equally evident that they could not have been so without
 having considered the drafts on *Lowe, Pattison & Co.* and *Wright, Williams*
& Co., as properly credited to the account of *J. R. Kirkland & Brother*. That
Richardson so considered it, is strongly indicated in the letter of *Taylor &*
Richardson, written by himself to the plaintiffs, and on the same day that the
 letter of *J. R. Kirkland & Co.* was written, the 10th of March, 1852, in which
 they say: "We are in receipt of information this evening that two hogsheads
 of sugar, purchased of *Messrs. Wright, Williams & Co.*, have been attached
 at your instance. We hereby authorize you to *Cr. J. R. Kirkland & Co.* for
 one-half of the cost of the sugar, which shall have early attention. If this ar-
 rangement will suit you, forward the sugar immediately as we are much in want
 of it. The writer thinks there is no cause of alarm about the debts of *J. R.*
Kirkland & Co., and will be much disappointed if all the debts due by them
 are not paid in six months." Why did *Richardson* propose to credit *J. R.*
Kirkland & Co. with one half of the cost of the sugar, if he did not consider
 himself liable as one of the members of that firm? Why express disappoint-
 ment if all its debts were not paid in six months? On the whole, we are of
 opinion that the drafts on *Wright, Williams & Co.* and on *Lowe, Pattison &*
Co. were imputed to the payment of the account of *J. R. Kirkland & Brother*,
 from which the balance of \$184 87 resulted, in accordance to the understanding
 of all the parties.

There is no evidence of any contract stipulating the payment of interest as
 alleged by the plaintiffs. We do not think the claim of the plaintiffs for dam-
 ages on the draft well founded, under the statute. The evidence shows that the
 sugar attached belonged to *Taylor & Richardson*, by whom it was bonded.
 But, according to the consent given in their letter, one-half of its proceeds
 must be applied to the payment of the plaintiffs' claims.

It is, therefore, ordered, adjudged and decreed, that the judgment of the
 District Court be reversed. That the plaintiffs do recover of the defendants,
Jesse R. Kirkland, William H. Kirkland, William H. Richardson, B. M.
Lowe, Alexander Pattison, and *T. N. Ward*, as syndic of the insolvent estate
 of *William H. Pattison*, in *solido*, the sum of fifteen hundred dollars, with
 legal interest from the 14th of January, 1852, the date of protest, and three
 dollars cost of protest, and that said plaintiffs do recover of *Jesse R. Kirkland,*
William H. Kirkland, and *William H. Richardson*, in *solido*, the further sum
 of seven hundred and fifty dollars and three cents, with legal interest from ju-
 dicial demand, the costs of both Courts to be borne by all the defendants.

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PHILO B. TYLER v. PAUL MARCELIN AND ISAAC DEPAS.

In a suit on a promissory note, the general issue is an admission of the signature.

When an act *sans seing privé* is permitted to be read in evidence, without objection, proof of its execution is waived.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Livingston*, for plaintiff. *Cohen*, for defendant and appellant.

VOORHIES, J. This suit was brought on a promissory note executed by *Massey, Marcelin & Co.*, and given in payment of a steam engine and boilers purchased of the plaintiff, who also claimed the vendor's privilege.

There was judgment in favor of the plaintiff, and the defendants appealed.

The appellants assign as errors in the judgment: 1st. That there was no sufficient evidence of the signatures to the note sued on: 2d. That there was no proof that they had assumed the payment of the liabilities of *Massey, Marcelin & Co.*; and 3d. That there was no privilege as against them.

1st. As the general issue is the only plea set up in the appellants' answer, it follows that the signatures to the note sued upon, must be considered as admitted. Nothing in the record shows that any objection was made to its introduction as evidence on that ground. When an act *sans seing privé*, is permitted to be read in evidence without objection, we consider proof of its execution as waived.

2d. The evidence satisfactorily shows that after the delivery of the note sued on, *Massey* conveyed all his interest in the partnership to his co-partners, the appellants, who thereby expressly assumed the payment of all its liabilities.

3d. The appellants having thus assumed the liabilities of the firm of *Massey, Marcelin & Co.*, vendees of the steam engine and boilers, it is clear that the plaintiff, as vendor, is entitled to the privilege claimed by him under article 3194 of the Code.

We are not prepared to treat the appeal as frivolous, and to allow the damages prayed for by the appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both Courts.

THE STATE v. CHARLES CAMMEYER et al.*

The Judge of the District Court was requested to charge the jury that the facts, as sworn to, did not constitute larceny. *By the Court*: The jurisdiction of the Supreme Court extends to criminal cases, on questions of law alone, and if we were to examine the facts on which the jury found the verdict, in order to determine whether the Court below erred in refusing to charge them that those facts did not constitute larceny, we would certainly be exceeding our jurisdiction, and deciding on the facts as well as the law. The facts proved in a cause constitute a basis for presumptions which can only be drawn by the jury, who are the legitimate judges of the law and fact in the finding of a general verdict, the only restraint on them consisting in the power of the Judge to set aside their verdict, when it is contrary to the law or the evidence.

APPEAL from the First District Court of New Orleans, *Larue, J. Morse*, Attorney General, for the State. *Dufour*, for defendant.

* The case of the *State v. W. B. Kinney et al.*, involving the same point, was decided on the same argument.

OGDEN, J. The defendants were indicted and convicted of the crime of larceny, and have brought the case before this Court on appeal, by a bill of exceptions, which is in the following words:

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"Be it remembered, that on the trial of this cause, *Alfred Higgins*, the principal witness for the State, having testified mainly as is contained in the annexed statement drawn by the Judge, the counsel for defendants requested the Court to charge the jury that the facts, as sworn to, did not amount, in law, to larceny; but the Judge refused said charge, and gave the following, as the law, to the jury: "It is necessary, in order to constitute larceny, that there should be a felonious taking, and that may be properly thus defined: 'the taking and carrying away are felonious when the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his interest in the goods, and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will. Whether, in this case, there has been such felonious taking, the jury must determine, from the facts proved.'"

The counsel for the defendants has argued in this Court, that the facts, a statement of which, signed by the Judge of the Court below, comes up with the record, do not constitute the crime of larceny, resting his hopes of reversing the finding of the jury, upon a distinction which he has drawn between the obtaining of the mere possession of the thing by artifice and deceit, and the case where the owner is induced by fraudulent representations, to part both with the property and the possession of the thing, in the latter of which cases he has produced numerous authorities, by which it has been adjudged there is no larceny.

The Court below was not requested to charge the jury that such a distinction existed, but was requested to charge them that the facts, as sworn to, did not amount in law to larceny. The jurisdiction of this Court extends to criminal cases on questions of law alone, and if we were to examine the facts on which the jury found the verdict, in order to determine whether the Court below erred in refusing to charge them that those facts did not constitute larceny, we would certainly be exceeding our jurisdiction, and deciding on the facts, as well as the law. The facts proved in a cause constitute a basis for presumptions which can only be drawn by the jury, who are the legitimate judges of both law and fact. In the finding of a general verdict, the only restraint over them consisting in the power of the Judge to set aside their verdict, when it is contrary to the law or to the evidence. The Judge of the Court below being satisfied with the verdict of the jury, the only power we have is to correct any errors of law which may have been committed. No such instructions to the jury were asked in the Court below, as to present a question of law alone for our decisions.

If the counsel for the prisoner had requested the Court to charge the jury that if they believed, from the evidence, the prosecutor had been induced by the fraudulent representations of the defendants to part both with the property and the possession of the thing, and had actually so parted with it, they were bound to find a verdict of not guilty; then the question of law involved would have been presented to us by the refusal of the Court to give the charge, but we have no jurisdiction over, and are not permitted to examine into the general facts of the case. These principles have been before decided in the following cases: *State v. Fant*, 2d Ann., 888. *State v. Bogan*, *ibid* 889.

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We have attentively considered the charge which the Judge did give the jury, and which was excepted to, and we are of opinion it is a clear and correct exposition of the law, and that no error has been committed. The judgment of the Court below is, therefore, affirmed, with costs.

Roselius applied for a re-hearing:

Is it possible that it can be seriously denied that the question, whether a certain state of facts—in relation to which there can be no dispute or controversy, constitutes the crime of larceny or not—is purely one of law? It would certainly be difficult for the wit of man to devise a question more exclusively and absolutely of law. Where, let me ask most respectfully, is the *question of fact* involved in this proposition? There is not, and there cannot be any *question of fact*, for the plain reason that all the facts established by the evidence are not and cannot be controverted, because, they are attested under the signature of the District Judge, and incorporated in the bill of exceptions. It is therefore clearly a mistake to say that "the Court is called upon to *give a decision on the facts as well as the law.*" The Court is simply called upon to decide that which, under the Constitution, it is bound to decide, what is the operation of the criminal law on the subject of larceny on the facts ascertained and admitted. That the court must apply the law to this state of facts, is true; but human ingenuity has not hitherto been able to propound any question of law in which the same thing had not to be done. Such a thing as a question of law without reference to a given state of facts, is a legal impossibility. When we say that a case presents a question of law alone, we do not mean to say that it is unconnected with any facts, for that would be a gross and glaring absurdity; we only mean to say that there is no dispute or *question*, as in the case at the Bar, about the facts. It is evident to every mind that there can be no *case* without facts, for the state of facts constitute the *case*. Hence it follows as an inevitable consequence that, if this case does not present a question of law which can be revised as presented by this record, no other criminal case can ever be brought before this tribunal, in which its appellate jurisdiction can be exercised; and thus one important—nay, the most important—branch of that jurisdiction is lopped off.

It is said that the view taken by the Court is sanctioned by two decisions of the late Supreme Court, namely—the case of the *State v. Fant*, (2d A., 838,) and that of the *State v. Bogan*, (ibid, 839.) But an examination of those cases will show that that Court never decided the point supposed. Indeed, there is not the remotest analogy between them and that now before the Court. In the first of those cases, the only point decided was that the District Judge could not be compelled to make a statement of facts, and that the appellate jurisdiction of the Supreme Court in criminal cases can only be exercised on a bill of exceptions, as in cases of writs of error. And the second case, which immediately follows the first, only reiterates the same point.

The decision is, therefore, destitute of any support, either in principle or authority, and I have little or no doubt that your honors will reconsider the case and correct the error which has been committed. In conclusion, I would respectfully ask the Court not only to grant a re-hearing, but to give a decision at the same time on the merits of the case, for, otherwise, the injury inflicted by the error of the Court will be irremediable. All the defendants are in prison, and cannot obtain their release until their illegal conviction is set aside by the judgment of this Court, or by the expiration of the term of their sentence.

OGDEN, J. (SIDEELL, C. J., and CAMPBELL, J., absent.) An application for re-hearing having been made in these cases, we have considered the reasons, and are satisfied with the judgment pronounced. We think no stronger illustration could be afforded of the correctness of it, that in passing on the question presented by the refusal of the Judge below to charge the jury that the facts proved did not establish the crime of larceny, we would be deciding a question of fact and not of law, than by quoting a portion of the opinion of the Judge in refusing a motion for a new trial, which is in these words: "It is useless to go into an examination of cases, in which it has been decided that it was not theft where the owner has sold his property, either for cash or on credit, however

much such purchasers may have been induced by the false pretence of the purchaser, and in which the purchaser has absolutely taken the property without paying or being able to pay for it, because no case of that kind can apply to the present. *Hines* sold one hundred and eighty-four ounces and some penny-weights of gold dust, and no more, if he sold them at all, which the testimony does not establish. If they took then from him two hundred and forty instead of one hundred and eighty-four, it cannot be presumed he had parted with the possession of the fifty-six ounces with his full consent at all. This is a fact which the jury are to determine—a fact which they did determine, and I do not choose to disturb their verdict.”

Re-hearing refused.

C. S. MAGOUN v. WM. B. DAVIS—Oakey & Hawkins Intervenors and Third Opponents.

An attachment will defeat a claim for advances, when the attachment has been served before the receipt of any bill of lading or letter of advice.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J. Van Dalseon*, for opponents and appellants. *Matthewson*, for plaintiff.

SLIDELL, J., (EUSTIS, C. J., absent.) For the reasons assigned by the District Judge, it is ordered, adjudged and decreed that the judgment of the Court below be affirmed, with costs.

The following are the reasons of the District Judge :

1. I am of opinion that the advances and supplies made by a resident of Louisiana for a plantation in Mississippi are not *privileged* thereon by the law of the former State, and as *no privilege* appears to be given in such cases by the laws of Mississippi, I am against the claim of the intervenors.

2. It has long been the settled jurisprudence of this State that an attaching creditor is to be paid by preference out of the funds attached, and this rule often bringing the attaching creditor into conflict with the creditors *claiming privilege*, has been always settled in cases like the present by the rules established in Art. 3214 C. C. and its amendments. See 1 L. R. 359, 8d Id. 801, &c., &c.

3. The proof showing the plaintiff's attachment to have been served *before the receipt of any bill of lading or letter of advice*, I affirm the former judgment, and order the proceeds of the cotton to be paid to the plaintiff, with interests and costs.

Van Dalseon, for a re-hearing. The judgment of the District Court is affirmed, “for the reasons assigned by the District Judge.” Trusting that the facts and the law connected with and bearing on this case are yet fresh in the mind of the Court, it is unnecessary, in this application for a re-hearing, to examine anything but the *reasons* of the District Judge, which have been adopted by this Hon. Court, and whereby the opponent's claim for a privilege on the cotton attached was defeated.

First reason assigned for judgment:

“I am of opinion that the advances and supplies made by a resident of Louisiana for a planter in Mississippi, are not privileged thereon by the laws of the former State; and as no privilege appears to be given by the laws of Mississippi, in such cases, I am against the intervenors' claim.”

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On the trial of this cause in this Hon. Court, we contended that, under the laws cited, merchandize and produce of every description are clearly bound, the moment they arrive in this State, for the purposes of commerce, no matter where the shipment may have been made, nor in what State the staple may have been raised. There can be no doubt of the correctness of this position, for the law says, the merchant or factor shall even enjoy the privilege if he *can show that the goods have been despatched* to him.

In the case of *Lee v. his creditors*, 2d Ann. Rep., p. 599, this Hon. Court sustains the doctrine as fully as it is possible for judicial decision to establish a fact in jurisprudence.

In delivering the opinion of the Court in *Lee v. his creditors*, the Hon. Chief Justice said: "We think that the framers of our Code, in establishing privileges on ships and vessels, did not intend to confine the operation of their legislation to those belonging to this port, or owned in this State."

We humbly submit to the Court, whether this doctrine is changed in *any* particular, by the fact, that the object of contest in this case is *cotton*, and not a *ship* or *vessel*? In the very next paragraph to the above quoted, is found the following language:

"A nation (State) within whose territory *personal property* is found, has as entire jurisdiction over it, *while there*, as it has over immovable property."

It is therefore believed that the "*first reason assigned*" is *not well founded*; for, if it be, the principle so clearly defined in *Lee v. his creditors*, is at once overthrown, and no longer to be regarded as authority.

Second reason assigned:

"It has long been the settled jurisprudence of this State, that an attaching creditor is to be paid by preference out of the funds attached; and this rule often bringing the attaching creditor into conflict with the creditors claiming privilege, has been always settled in cases like the present, by the rules established by art. 3214, C. O."

This reason entirely disregards the statute of 1841, which amends article 3214, C. C.—a law made expressly to better secure the merchant and factor for the advances made to farmers and others, both in the State *and out of it*.

The law of 1841, Feb. 17th, section 1st, says:

"That article 3214 be so amended, that every consignee, commission agent or factor shall have a privilege *preferred* to any attaching creditor on the goods consigned to him for any balance due to him, *whether specially advanced on said goods or not*, provided they have been received by him, or invoice or bill of lading has been received by him previous to the attachment."

Now the article amended by this law reads as follows:

"Every consignee or commission agent who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances, with interest and charges on the value of the goods, if they are at his disposal in his stores, or in a public warehouse, or if before their arrival he can show a bill of lading or letter of advice, *that they have been despatched to him*."

Now, both the article and the amendment are clear on *one point at least*, which is, that the privilege is conferred on any one who has the goods at his disposal—in his stores—or in a public warehouse, or, *if before the arrival* of the goods, he can show a bill of lading or letter of advice that have been despatched to him, "*or invoice on bill of lading has been received by him previous to the attachment*."

At pp. 26 and 27 of the Record, are to be found not only the bill of lading received by *Oakey & Hawkins*, but a *letter of advice*, of *this and other shipments* from the defendant *Davis* to *Oakey & Hawkins*—the *very case provided for by article 3214, and the law of 1841*. And yet, the "*reason assigned*" permits these facts to slumber in the Record, while a foreign attaching creditor—who *dared not attempt* to execute the judgment obtained against *Davis* at the *very domicile* of both plaintiff and defendant—carries off, triumphantly, the *very thing* which the law has declared to be a security to the commission agent or factor for the restitution of his advances to the shipper.

It were idle to enter into an elaborate argument to show that the goods shipped were "*at the disposal*" of the consignee and factor the moment the carrier had delivered the bills of lading for them; for if *Magoun*, the ordinary judgment creditor of *Davis*, could not, by virtue of the laws of Mississippi, ex-

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cute his judgment on this cotton *at the very point of shipment*, upon what hypothesis is he accorded that privilege, at the very domicile of the *factor*, and at the very period of time when the transit of the goods shipped is perfectly completed? Can it be pretended that the plaintiff had no opportunity of executing his judgment at defendant's domicile and at the point of shipment, if by the laws of Mississippi he had a *right* to do so? The answer is *no*, for two reasons:

First. Because the plaintiff's counselor at law acted as his attorney in fact in the attachment, and could not possibly have had an officer on the levee in this city waiting for *that particular boat with that particular cotton*, without the most explicit information from the plaintiff himself.

And, secondly, because the record shows that *Davis* shipped his cotton in the usual manner—concealing nothing, nor adopting any measures to divest himself of his property except in the form of ordinary commercial transactions, to wit: by regular consignment to his factor. It is, therefore, believed that the second "reason assigned" is also unfounded in law and equity.

Third reason assigned:

"The proof, showing plaintiff's attachment to have been *served before the receipt of any bill of lading or letter of advice*, I give the proceeds to plaintiff."

We respectfully inquire how this reason can possibly be reconciled with the fact, that the record shows both bill of lading *and* letter of advice, etc. The District Judge in his "reasons assigned," *never mentions the bill or letter found in the record*, when a moment's reflection shows to any legal mind that these two circumstances or facts, constitute the very essence of the consignee's right and privilege on the goods shipped to him.

By every principle of commercial law, the destination of the cotton was fixed by the shipment thereof and the delivery of the bills of lading; and from that moment the shipper himself could not divert the shipment from the factor. It is only in cases of bankruptcy of the consignee that even the shipper can stop the goods *while the transit is yet incomplete*; but all the authorities declare that if the transit be completed by the arrival of the ship at the port of destination, the property is at once vested in the consignee. This case is the same, as far as the vesting of the property goes; and we cannot conceive how a *creditor of Magoun* can exercise a right over his property, when *Magoun himself* has no such right under the law.

These remarks being well considered, it is believed your honorable Court will grant a re-hearing in the premises.

All of which is respectfully submitted.

The re-hearing having been granted, the judgment of the Court was pronounced by

BUCHANAN, J. In this case our predecessors affirmed the judgment of the District Court for the reasons given by the Judge of that Court.

A re-hearing having been granted, the case has come before us for consideration, upon additional argument of counsel.

The contest is between an attaching creditor, and an intervenor claiming a privilege for advances, acceptances, supplies to a plantation, &c., and for a balance of account due by the defendant, a planter, to the intervenor, a commission merchant.

The District Judge was of opinion, that it was proved the attachment was *served before the receipt of any bill of lading, or letter of advice by intervenor*.

The evidence upon this point is not altogether clear; but it may be assumed that the intervenor has entirely failed to show that he had received a bill of lading, or letter of advice, before the service of the attachment, and the seizure and detention of the cotton by the Sheriff.

The intervenor claims a privilege, under the Article 3214 of the Civil Code, and the Act of 1841, amending that Article.

We are of opinion that the burden of proof was incumbent upon the intervenor, to make out such a state of facts as would give him a privilege under the

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law; and as he has failed to do so, that the plaintiff must be maintained in the right acquired by his attachment.

It is, therefore, decreed that the judgment heretofore rendered in this cause by the former Supreme Court, be maintained.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE NORTHERN BANK OF
KENTUCKY v. GEORGE W. SQUIRES.

The only formality required by law to make absent creditors parties in cases of voluntary surrender under the Acts of 1817, is the appointment of Counsel to represent the absent creditors.

The order of a Court of this State, made under the authority of a law of this State, accepting a surrender of an insolvent's property, and staying all proceedings against him, precludes any creditor from instituting a suit in a Court of this State—unless the law itself is a nullity.

The State, in its sovereign capacity, can exercise the fullest authority over its own tribunals, and prohibit citizens of other States from suing in them on contracts made either in or out of the State, unless there is some superior power by which her authority in this respect is circumscribed.

The insolvent laws of this State expressly extend their operation to all persons, whether citizens of other States, or foreigners, and all contracts are declared to be affected by them, whether made in, or out of the State, or to be performed in, or out of the State.

It is settled by judicial authority:

1st. That the insolvent, or bankrupt laws of a State, if not suspended by the enactment of an uniform bankrupt law by Congress, are constitutional and valid as to all posterior contracts entered into between citizens of the State where such laws exist, and equally so whether they affect the obligations, or the remedy.

2d. That a discharge, under such laws, as between citizens of the State where the discharge is granted, and as to contracts made and to be executed there, is valid and binding everywhere.

3d. That it is only in regard to contracts made between citizens of different States, and not stipulated to be performed in the State where the discharge is granted, that the validity of such discharge can be questioned, if at all, in the Courts of the State where it was granted; although in the Courts of the United States, according to their existing jurisprudence, a discharge, under these circumstances, would not be held good as a plea in bar.

A bill of exchange drawn by a citizen of Louisiana, upon and accepted by citizens of Louisiana, and payable to the order of a citizen of Louisiana, will be understood as intended to be made payable in Louisiana, if no stipulation to the contrary appear.

It is well settled that State insolvent laws discharging the obligation of future contracts, are constitutional. (SLIDELL, C. J.)

Where a bill of exchange is accepted by a merchant living and transacting his business in Louisiana, the reasonable expectation of all parties must be that it is to be paid in Louisiana. (SLIDELL, C. J.)

I cannot understand by what right the transferee of a Louisiana creditor can ask a Court of Louisiana to disregard its own insolvent laws and violate a *cessio bonorum*, and a stay of proceedings, regularly adjudged in a Court of Louisiana. Such a doctrine, it seems to me, would involve principles subversive of State sovereignty, and for which I can find no sufficient warrant in the constitution of the United States, (SLIDELL, C. J.)

A PPEAL from the Third District Court of New Orleans, *Kennedy, J. Bonford & Finney*, for plaintiff and appellant. *Sidney L. Johnson*, for defendants.

The following printed arguments were filed:

Bonford & Finney, for plaintiff:

The defendant, in his written argument, has labored to show that the insolvent act, so far as he claims the benefit of it, is a mere modification of the remedy, and does not affect the obligation of the contract.

Our Supreme Court, however, has decided the same point against him, in the case of *Fisher, Burgess et al, v. Wheeler & Ellis*, 5 Ann. Rep. 271.

In the case of *Boyle v. Zacharie*, 6 Pet. 635, *Zacharie* had obtained a judgment against *Boyle* in the State of Maryland, after *Boyle* had taken the benefit of the insolvent act of that State. It was not pretended that the debt was discharged. Many years afterwards *Zacharie* caused an execution to be levied on a ship which *Boyle* had acquired after his surrender. *Boyle* enjoined the proceedings, on the ground that the insolvent proceedings exempted such property as he might thereafter acquire, from seizure for debts contracted before his surrender.

The Supreme Court of the United States held, that so far as the Maryland Act, and proceedings under it, operated to protect the property of *Boyle* from *Zacharie's* execution, they were invalid and in contravention of the constitution of the United States.

Our State law not only exempts all the future acquisitions of the insolvent from execution; but perpetually enjoins all actions at law, except the futile one of forcing a new cession. Moreover, so much of the subsequent acquisitions of the insolvent as may be necessary for his support and the maintenance of his family, is exempt from all liability whatever for debts contracted before the cession. This provision covers a handsome fortune.

Such a law appears to us to destroy the vital principle of the obligation, deprive it of all value, paralyze its legal effect, and leave but an abstract right, without any legal sanction. There can be no right without a remedy. To destroy the remedy, or so impair its exercise as to make it ineffectual, destroys or impairs the right itself.

1 How. S. C. R. 311, *Bronson v. Kinzie et al.*

8 Wheaton, 1, *Green v. Biddle*.

We consider ourselves protected from the insolvent proceedings pleaded against us in this case, by the constitution of the United States, and the following decisions:

12 Wheaton, 213, *Ogden v. Saunders*.

12 Wheaton, 369, *Shaw v. Robbins*.

8 Pick. 194, *Braynard v. Marshall*.

5 Mass. 509, *Baker v. Wheaton*.

10 Mass. 337, *Watson v. Bourne*.

6 Pet. 635, *Boyle v. Zacharie*.

5 How. S. C. R. *Cook v. Moffatt*.

This case cannot be distinguished in any respect from the case of *Braynard v. Marshall*, 8 Pick. And the doctrine of that case is fully supported by the opinions delivered in the cases cited from 5 Mass. 10 Mass.

The defendant's counsel has endeavored to distinguish this case, however, from the case of *Ogden v. Saunders*, and *Shaw v. Robbins*, in this—that in those cases the bill was payable, in its inception, to a citizen of a different State from that in which it was made and the insolvent proceedings were had. Whereas, the counsel insists that the bill in this case was payable to and discounted by a citizen of the State in which it was made, and the insolvent proceedings had.

We see no force in the distinction. But we will first state the facts as we understand them. The bill was created, just as the plaintiff purchased it, for the purpose of being sold to any person whatever, without regard to his citizenship or domicil. The plaintiff traces title through *Mr. Taylor*, the last endorser. The drawing, endorsing and accepting the note, were all one act, by which a security was made to be sold in the market for the benefit of the drawer. Neither the drawer or endorser ever had any right of action on the bill—and, as among the original parties, it represented no debt whatever.

There is no force then in the argument that the bill is subject to the insolvent laws of this State, because it was originally payable to one of its citizens. For, as between that payee and the other parties, there never was any debt or obligation to be affected by the insolvent laws of this State. But it is said the bill was once held by *Mr. Hunton*, a citizen of this State. We are not informed who first discounted it. It may have been first discounted by a citizen of some other State. *Mr. Hunton* is no party to the bill, and we derive title, not from him, but from *Mr. Taylor*. Nor does it appear that the officers of the bank, who discounted it, knew that *Mr. Hunton* ever had been its owner. It was

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offered for sale by *Mr. Trotter* through a friend. The officers probably never enquired or understood to whose benefit the proceeds were to go.

See Story on prom. notes, sect. 193.

The bill in its concoction was endorsed in blank by *Miles Taylor*, and thus was made payable to bearer. In this condition it was offered for sale; and can no more be said to have been payable to a citizen of this State than a bank note. It was contrived in that form for the express purpose of being conveniently circulated, and to represent a debt due to any holder.

Suppose the bill had been discounted by a citizen of another State, (as it may have been for aught that we know,) would the fact that *Mr. Hunton* had once owned it, although he left no trace of his ownership, defeat the plaintiff's action, by interposing the bar of the insolvent proceedings?

But conceding the fact to be as assumed by the learned counsel, that the debt was created in the State of Louisiana, and between citizens of this State—we deny the conclusion, viz: that we hold the bill subject to the same conditions which attended it in the hands of the transferrer.

In the decisions of the cases of *Saunders v. Ogden*, and *Shaw v. Robbins*, no stress was laid upon the fact that the bills were originally made payable to, or given to, citizens of other States than those in which they were drawn. The decisions proceeded upon the ground that the insolvent proceedings had no effect beyond the limits of the State in which they were had, and could not affect the rights of citizens of other States. This principle covers the present case.

The fact that the bill was made payable to a citizen of this State, or originally discounted by a citizen of this State, might be supposed to subject it, in its effect and construction, to the laws of this State. But this would be equally true of a bill made in this State, though payable to a citizen of another State. The bill sued upon in *Saunders v. Ogden* was as much subject in its effect to the laws of New York, as though it had been made payable to a citizen of that State. It is not the person to whom a note or bill is made payable that determines what law shall determine its effect and construction. It is the place where it is made. But the constitution of the United States is the paramount law of all the States. And according to that instrument, as expounded in *Saunders v. Ogden*, and other cases cited, a bill or note created in any one State, cannot be extinguished or impaired by any insolvent proceedings in that State, when, at the time of the insolvent proceedings, the paper should happen to belong to a citizen of another State. This is the *lex loci contractus*, or at least, a part of that law. It is as much a part of the law of Louisiana as any law on her statute book.

When the question is whether a bill or note is discharged or affected by judicial proceedings, it is not considered important to enquire who was the payee, and whether he was a party to those proceedings. But the proper enquiry is, who was the holder at the time of those proceedings, and was he a party to them? Was he amenable to the jurisdiction of the Court? Is he bound by its judgment?

It is insisted that we only acquired the right of the person from whom we bought the bill. It is enough for us that we did acquire his right. We purchased the bill for valuable consideration before its maturity, without notice of any defence, and might perhaps have purchased more than the rights of the person who sold to us. But it is enough that we acquired from him a right to demand and receive the amount of the Bill from any prior party. This is precisely what the seller transferred to us. The defendant's counsel insists, however, that he transferred more or less than this, viz: his own liability to be made a party to and affected by certain judicial proceedings in this State. We do not admit that there was any such condition to the transfer. It was not express, nor does it result from legal implication. The position of the defendant is: that because *Mr. Hunton*, from whom we bought this bill, was liable by his domicile to be made a party to the cession and to be bound thereby, we, by buying the bill from him, are to be deemed parties to the cession to which he might have been made a party, and to be bound by those proceedings without being parties. The insolvent proceedings are a species of remedy to which *Mr. Hunton* might have been subjected in favor of his debtor, had he continued to be the holder of the debt. He would have been subjected by reason of his domicile. But this was a mere personal inconvenience on his part—a mere sub-

jection to the Courts of his domicil which did not attach to the paper transferred.

There is no inherent liability in the paper to be discharged by the insolvent laws of this State. Its liability to be so discharged when it exists at all, is not in the paper, but in the subjection of the holder by reason of his domicil and other circumstances, to the jurisdiction of the Courts of the country where the paper was created. And the fact that there is no such inherent quality of the paper is apparent from the admitted principle of international law, that no foreign country is bound to give effect to the insolvent laws of the place of the contract, or any proceedings under it. And if the insolvent law entered into the contract and formed a part of it, every Court of every country would be bound so to interpret it. See opinions of *Judges Taney and Grier*, in *Cook v. Moffatt*; the opinion of *Chief Justice Marshall* in *Saunders v. Ogden*, and the argument of *Mr. Webster* in the same cause. Indeed, in this latter case, the idea that the insolvent law of the place of the contract entered into and formed part of the contract, was carefully examined and completely refuted. We understand that case to have decided that the insolvent laws of the place of the contract did not enter into the contract; that there was no inherent quality in the debt, which subjected it to the operation of those insolvent laws, or the proceedings of the Courts of the place of contract under those laws; and that the liability of the debt to be affected by those laws and those proceedings was not an inherent quality of the debt itself, but depended on the domicil and subjection to jurisdiction of the owner of the debt. Indeed, in the case of *Ogden v. Saunders*, the argument for the defendant *Ogden* was, that the contract was made in the State of New York, as it undoubtedly was in point of fact, and that the insolvent laws of that State entered into and formed part of it. And this doctrine was refuted in the decision of the Supreme Court.

We beg pardon for so much argument, or, at least, discussion, on a matter which has been already so much discussed by such able persons.

The very question here presented was decided in our favor in 8 Pick. 194. The cases of *Watson v. Bourne*, and *Baker v. Wheaton*, affirm the same doctrine; and the reasoning of the Court and the principle of the decision in *Saunders v. Ogden*, in our judgment, entirely support us.

Johnson, for defendant.

The first question to be considered is, What is the law applicable to the contract sued on? Is it a Louisiana contract? Of this there can hardly be a question. It would be difficult to say under what law it was created, if not under that of Louisiana. We do not understand the plaintiffs to contend that, because the present holders are domiciled in Kentucky, the contract is a Kentucky contract. They have not asked the acceptors to pay them six per cent. interest, according to the laws of Kentucky. They have asked for five per cent. according to the law of Louisiana. The plaintiffs seek to ignore the real facts of the case, and, looking at the names on the bill, say that they have title through *Mr. Taylor*, the last endorser, and have no knowledge of *Mr. Hunton* as a party to it. Be it so. Then, on the face of the bill our contract was with the drawer and payee, citizens of Louisiana, the State in which the bill was dated, accepted and endorsed. *Laforest & Squires*, a mercantile firm doing business in New Orleans, having a mercantile domicil there, and no where else, were drawn upon there, by a citizen of Louisiana, accepted there, payable to a citizen, and by indentment of law, were to pay there on presentment of the bill there at maturity. The plaintiffs caused the bill to be presented to them there for payment, and protested for non-payment, and the drawer and endorsers on the bill were notified of protest at their domicils in Louisiana.

Any other presentment would have been bad, and would have discharged the drawer and endorser. So, also, any other notice of protest than one made to the drawer and endorsers at their domicils in Louisiana. If the plaintiffs, dissatisfied with the conclusions which result inevitably from looking at the bill alone as ordinary commercial paper, begin to inquire for other facts to modify these conclusions, they cannot select part of these facts for their use, and reject others which are inconvenient. They cannot discover that *Taylor* and *Winchester* were accommodation endorsers, who, beyond putting their names to the paper, had nothing to do with putting it in circulation, and still continue to suppress *Mr. Hunton*, with whom alone, through their agent, they contracted for

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the purchase of the bill. The knowledge of their agent, *Mr. Trotter*, was their knowledge.

It is idle to suppose that the bill may have been discounted by somebody else before *Mr. Hunton*. If such had been the case, and plaintiff had any interest in showing it, he would have done so. The defendant did not endeavor to shelter himself under the favorable inferences which might be drawn from the form of the bill, but himself alleged and proved the real facts of the case. It is assumed to be fully proved that the defendant and other parties to the bill contracted directly with *Mr. Hunton*, the first purchaser of the bill, and that this contract was a Louisiana contract, made between the citizens of Louisiana, and subject, in all respects, to Louisiana law.

Such being the facts, we make the following points:

I. Even if the contract had been discharged under our insolvent laws, it would be no violation of the Constitution of the United States, inasmuch as the contract was made in the State of Louisiana, between citizens of that State, and was to be performed therein, and is to be governed by the laws of that State in existence at the time the contract was made, among which was the insolvent law in question. The sale of the bill by *Mr. Hunton* to the plaintiffs was another contract, which could not change the nature of the obligation of defendant. By it the plaintiffs acquired the right of the assignee against the defendant, and nothing more.

It would be presumptuous to attempt to offer an argument in support of these propositions, when we have that of Story in sections 166, 167, 168, 169, 170, also section 158, in his work on Bills. He there comments on the case of *Braynard v. Marshall*, in 8th Pickering, p. 194, and compares it with a previous decision of the same Court in *Blanchard v. Russell*, 18 Mass., 1. In reading these remarks of Story, it should be recollected that he was one of the Judges who, in the case of *Ogden v. Saunders*, took the highest ground against State insolvent laws, and that he delivered the opinion in *Boyle v. Zacharie*, in which the Court took occasion to affirm the decision in *Ogden v. Saunders*.

In 1st Kent, p. 465, ed. 1851, [*422, former editions,] the result of the decisions of the Supreme Court is well and accurately summed up in these words:

"It remains yet to be settled whether it be lawful for a State to pass an insolvent law which shall be effectual to discharge the debtor from a debt contracted after the passing of the act, and within the State making the law. The general language of the Court would seem to reach even this case; but the facts in those cases decided do not cover the ground, and the cases decided are not authority to that extent. [6th note.] It will be perceived that the power of the State is exceedingly narrowed and cut down; and, as the decisions now stand, the debt must have been contracted after the passing the act, and the debt must have been contracted within the State and between citizens of the State, or else a discharge will not extinguish the remedy against the future property of the debtor."

In note 6 to the above passage it is said that, in *Bronson v. Kinzie*, 1 How. 311, it was conceded that contracts made subsequent to the stay laws in Illinois were to be governed by them, if made to be executed in the State.

The case of *Ogden v. Saunders* is not inconsistent with the doctrines of Kent and Story, and is not like that before the Court. The bill sued on was drawn by *Jordan*, of Kentucky, in favor of *Saunders*, of Kentucky, on *Ogden*, of New York. (Compare the first and fourth findings of the special verdict at the beginning of Judge Johnson's opinion, 12 Wheat. 271.) Although the acceptance was made in New York by one residing there, on whom the bill was drawn, the other contracting parties were not citizens of that State, and, except by drawing and taking a bill on a citizen of New York, had not in any way subjected themselves to the operation of the New York laws.

Still, in a scientific and philosophical point of view, it was a New York contract, so far as *Ogden* was concerned, and the decision was in derogation of the general principle that the *lex loci contractus* is to govern, unless when a place of performance different from that of contract is contemplated. It is from this abandonment of a general principle, which alone furnished a safe guide, that so much doubt and difficulty have been found in the application of the case of *Ogden and Saunders*.

It has been considered a rule for the particular forum, the Federal Court—or the Courts of States, other than that which granted the discharge—rather than

a principle of law, to be followed by all Courts alike. In this connection, a remark of great significance, respecting the array of authorities on which the counsel for plaintiffs stakes his case, will be found applicable to them all. In none of them were State Courts called upon to nullify their own insolvent laws. In most of them it was more or less explicitly assumed that the State Courts were bound to give effect to their own insolvent laws, as the extent and nature of the remedy to be afforded were governed by the laws of the forum in which the remedy was sought. On this point, and many others, no more instructive case can be referred to, than that of *Town v. Smith*, 1 Woodbury & Minot's Rep., pp. 118, 137, decided by Judge Woodbury, as Judge of the United States Circuit Court of Massachusetts, in which he reviews rather briefly and abstrusely, but ably, the decisions and principles applicable to discharges under State insolvent laws.

The decision in *Cook v. Moffat*, 5 How., 307, which, says Judge Grier, is ruled by *McMillan v. McNeil*, 4 Wheaton, 209, is not at variance with any principle we contend for, and the opinion of Judges Grier, Taney, Daniels and Woodbury, certainly do not indicate any disposition to go beyond the case of *Ogden v. Saunders*. It is well to observe that both the facts and the points of *Ogden v. Saunders*, are inaccurately stated by Judge Grier, in the case of *Cook v. Moffat*.

On principle and authority it is believed that the point we commenced with, must be conceded.

II. The State law, so far as it applies to defendant, and is set up by him in defence to this action, is a simple modification of the remedy, in no manner affecting the obligation of the contract, which it leaves in full force. It does not fall under any restriction contained in the Constitution of the United States. Even this modification of the remedy is not by a law posterior to a contract, but by one long prior to it, analogous to appraisement laws, to laws exempting tools and other property from seizure, which have never been deemed repugnant to the Constitution of the United States in their effects on debts contracted after their existence.

Since imprisonment for debt was abolished by the act of 1840, a surrender, or *cessio bonorum*, such as that set up in defence in this case, has no other effect in favor of the debtor who makes the surrender, than the modification of the remedy against his future property, provided for in the latter part of Art. 2173, and in the 28th Sec. of the Act of 1817. This modification was nothing more than a declaration of the existing law, the Spanish law, which had prevailed in Louisiana since 1769. It had its origin in the Roman law, Makeldey, liv. 6; it was re-enacted in Spain in law 3, tit. 15 of the 5th Partida, and is stated in Tapia Febrero in few words to the same extent and effect as under our Code. Tapia Febrero Lib. 111, Tit. IV, Cap. 1 §13. Carried to the extent which we claim for it in this case, it has never been held repugnant to the Constitution of the United States. See the reasoning of Judge Matthews, in *Ray v. Cannon*, 2 N. S. 30.

In *Sturges v. Crowninshield*, 4 Wheaton, 419, Chief Justice Marshall held that an insolvent law which discharged only the person of the debtor, leaving his obligation in full force, was not repugnant to the Constitution. In another passage, he said: "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

But, in our case, no remedy has been changed since the contract was made. By the surrender of the property of the defendant we have arrived at a gradation in the remedy which was provided for by the Code of 1825, and the Act of 1817, long before the contract was made. As, before the surrender, certain things were exempted from seizure, so now, since the surrender, a larger portion of the new acquisitions is exempted therefrom, and the creditor is obliged to allege and prove the facts which authorize the action for a new surrender. *Vauquelin v. Platet*, 12 R. 382. *Plympton v. Preston*, 4 An. 356. Priority is, moreover, most equitably given to new creditors. C. C. 2173, Sec. 28, Act 1817.

The present suit is an endeavor to induce our own Courts to defeat the policy of a law of the State which "was certainly conceived," to use the language of the Court in *Plympton v. Preston*, 4 A. 359, "as much in a spirit of mercy to the debtor, as of justice towards his creditors."

Our own Courts are called upon to declare this modification of the remedy a violation of the Constitution of the United States, although like the appraisement law and the law exempting certain articles from seizure from debt, it existed long before the contract was made, the obligation of which it is said to have impaired. Not one of the cases quoted by the counsel for the plaintiffs

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affords a precedent for the decision which he now asks of the Court. In the case of *Fisher v. Wheeler*, 5 A. 271, which is confidently quoted as settling this point against us, our Supreme Court says: "The question on which this case has been presented in the argument of counsel, is whether *King* and *Fisher* are bound by the insolvent proceedings, had in New Orleans—they, as well as the defendants, having been citizens of the State of Missouri at the time of the making of the note, and the note having been executed and made payable in the said State. The case has been argued by the counsel on both sides as resting on authority, and the argument has been confined to the authorities cited.

"We think the rule to be settled that the State insolvent laws do not extend to a contract made in another State, and to be there executed between citizens of other States; and that a discharge under these laws does not extinguish the remedy against the future property of the debtor who has taken the benefit of them. The point has been repeatedly decided in express terms. *Witt v. Follett*, 4 Wendell, 458, and cases cited by counsel. 2 Wendell, 458, same case.

* * * * *

"The defendants obtained no discharge from their creditors, but have pleaded their application for the benefit of the insolvent law, the acceptance of the cession of property, and the stay of proceedings ordered by the District Judge on accepting the cession, which raises the question before stated, whether the plaintiffs are bound by the insolvent proceedings of the defendants.

"It seems to follow necessarily from the rule above stated, as the plaintiffs did not attempt to reach the property vested in the creditors by the cession made by the insolvents, but merely asked for judgment on their debt, the proceedings in insolvency are no legal impediment to their action."

It is evident that the only point ruled by the Court is one we all admit, that contracts made and to be executed in one State, between its citizens, cannot be discharged by the insolvent laws of another State. The distinction between a law discharging a contract, and one affecting the remedy, was not clearly presented in argument, and was in no manner considered or decided upon by the Court.

The counsel for plaintiff then cites *Boyle v. Zacharie*, 6 Peters, 635, and asserts, very inaccurately, if we may attach faith to the argument of *Mr. Wirt*, for the appellant, (p. 638, §2,) that it was not pretended that the debt was discharged. It was most seriously contended that the debt was discharged by Maryland insolvent laws, as being a Maryland contract. It was decided (*Judge Story* giving the opinion of the Court, and no one dissenting,) that it was a Louisiana, and not a Maryland contract, and therefore unaffected by the insolvent act of the latter State.

The counsel for plaintiffs say that "to destroy the remedy, or so to impair its exercise, as to make it ineffectual, destroys or impairs the right itself." In support of this doctrine, which we have no concern with, he quotes *Bronson v. Kinzie*, 1 Howard, S. C. R., 311, and 8 Wheaton, 1, *Green v. Biddle*.

In both these cases the Legislature had passed acts subsequent to the contracts, which destroyed or impaired the remedies existing at the time the contracts were made. It is difficult to see their application to the present case, in which the defendant invokes the aid of no law subsequent to his contract. It may be well, however, to quote here what Chief Justice Taney, in *Bronson v. Kinzie*, says of the effect of the stay laws of Illinois, on posterior contracts:

"Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the Courts of the United States, as well as those of the State. We speak, of course, of contracts made and to be executed in the State. It is a case of that description that is now before us, and we do not think it proper to go beyond it."

If the defendant in this case had been sued in Kentucky, it is not pretended that his cession in Louisiana would avail him there, nor in any other State of the Union, in which he or his property might be found, for the simple reason the cession has not operated a discharge of the debt, but merely a modification of the remedy. The Courts of Louisiana alone are bound to give it effect.

Not a single case has been cited in which a State Court has refused to be governed by its own insolvent laws when applied to contracts made under them; not one in which it has been held that such laws should not be applied in the Courts of the State. All of the cases relied upon by the plaintiffs were either in Courts of the United States, or in Courts of States other than those in which the insolvent proceedings, set up in defence, had taken place. Nearly all of them assume that the Courts of the State in which the insolvencies occurred would be bound to give them effect. It is admitted that if *Mr. Hunton* had continued to hold the bill sued on, he would be bound by the cession. By his having passed it to a foreign holder it is contended that the law of this case is changed.

When it becomes known that by assigning a Louisiana contract to a foreigner or a citizen of another State, he is enabled to defeat in our own Courts the beneficial intention of the State insolvent law, bills and notes, as well as cotton and sugar, will become regular articles of Louisiana export.

The importance of this suit to the defendant is far beyond the amount involved. If this suit is successful, he knows not how many others will follow it; enough, at any rate, to darken his prospects, to paralyse his industry, to destroy all hopes of a provision for the education and support of his family. This will all take place without any advantage to the creditor.

The Constitution of the United States is invoked to produce this result. We think we have shown that this is not a *dignus vindice nodus*, that there is no call for the interposition of any constitutional prohibition, and that this is a case where, if ever, the humane policy of the State should be carried into effect by its Courts.

In conclusion, we call the attention of this Court to the able opinion in our favor of the District Judge.

Bonford & Finney, for plaintiffs.

The brief already filed by us in this case was prepared for the inferior Court, in answer to a short manuscript argument handed the Judge by the counsel for the defendant. The brief filed in this Court, in behalf of the defendant, is his counsel's reply to our answer to that first manuscript argument. This explanation is necessary to understand the allusions of counsel to each other's briefs.

The defendant, in the lower Court, had argued that the insolvent acts, so far as he claims their benefit, were an admissible modification of the remedy, and not a law impairing the obligation of the contract, within the meaning of the tenth section of the first article of the Constitution of the United States. In our brief we referred to your honors' decision in the case of *Fisher, Burgess & Co. v. Wheeler & Ellis*, 5 Ann. 271, as deciding this point adversely to the defendant. The counsel for the defendant denies that any such decision was made in that case, and in order to prove it, has quoted in his brief a part of that opinion. But in his quotation there is an hiatus, indicated by stars, indicating that a paragraph has been omitted. That omitted paragraph shows at once that your decision did turn upon the conflict of the insolvent laws, in respect of their effect in perpetually enjoining the action of the creditors, with the Constitution of the United States. The defendants in that case claimed the same benefit from the insolvent proceedings, which is claimed by the defendant in the present case. *Wheeler & Ellis* did not pretend that they had obtained a discharge.

In the paragraph omitted by the learned counsel in his quotation, your honors refute an argument which had been urged by the counsel for the defendants, *Wheeler & Ellis*, based upon the decision in the case of *Ray v. Cannon*, 2 N. S. 30. In *Ray v. Cannon*, it was decided that the Constitutional prohibition of the enactment by the States, of laws impairing the obligation of contracts, did not apply to the insolvent laws of this State, because they were not passed by the State, but had been adopted under the dominion of the government of Spain and the territorial government, and did not come within the terms of the constitutional prohibition. Your honors held that the insolvent laws considered, in the case of *Ray v. Cannon*, to wit: the insolvent laws existing here before the formation of the State government had been repealed—that the insolvent laws, with which you had to deal, in the decision of the cause before you, had been adopted since the establishment of our State government, and were therefore within the terms of the Constitutional prohibition.

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At all events, we so understand your argument, and beg your honors to refer to the omitted paragraph, or at least such of you as did not take part in the decision.

And it is manifest that the decision of your honors cannot be supported on any other ground, than that the stay of proceedings pleaded by the defendants, was in violation of the Constitutional prohibition. The regularity of the insolvent proceedings was not questioned. The stay of proceedings granted by the Judge, and the purview of the insolvent laws applied as well to foreign creditors and foreign contracts, as to domestic creditors and domestic contracts.

The claim of *Fisher, Burgess & Co.* was clearly within the purview of the stay of proceedings and of the insolvent laws, in pursuance of which that order was granted. And except for the Constitutional prohibition, no reason can be imagined why the stay of proceedings should not have been held effectual.

The learned counsel for the defendant also charges upon us an inaccuracy in our statement of what was controverted, and what was decided in the case of *Boyle v. Zacharie et al.* Upon a re-examination of the case, we find we were substantially correct. *Boyle* had obtained his discharge under the insolvent laws of Maryland, on the 31st of December, 1819. In the year 1821, *Zacharie* obtained a judgment against him, which, by agreement, was entered, subject to the legal operation of the discharge under the Maryland insolvent laws. In the year 1827, an execution was issued, which was levied on a ship belonging to *Boyle*, who filed a bill in chancery, praying an injunction of the proceedings under the execution. The injunction was issued, was dissolved upon a hearing, and from the decree of dissolution an appeal was taken to the Supreme Court of the United States. In his bill, *Boyle* alleged "that by the provisions of the insolvent laws of Maryland, (he) the complainant, was entitled to be protected in the enjoyment of all property acquired by him since the date of his discharge under the said insolvent laws; except such as he might have acquired by gift, descent, or in his own right by bequest, devise, or in any course of distribution, and that he had not, since his discharge aforesaid, acquired any property in any of the modes thus specified." This clearly admits that if he had acquired property by gift, devise, bequest, descent, or in course of distribution, such property would have been liable for the debt, and of course that the debt itself existed to bind the property. We have made every endeavor to get hold of the Maryland statutes, to ascertain the provisions of the law under which *Boyle* obtained his discharge, and failing to find a copy, have examined carefully all the Maryland reports within our reach. And we find indubitable proof that the Maryland insolvent laws did not discharge the debt, but only the person, and such subsequently acquired property of the insolvent as did not come to him by gift, devise, bequest, descent, or in course of distribution.

The effect of the discharge is only to exempt such subsequent acquisitions of the insolvent as are the fruit of his personal exertion. The debt and legal process to collect it are as free as before against all property, but that which is thus exempted, doubtless with a view to promote industry. The policy of the law seems to be merely to give the insolvent a motive to labor.

Thus in the case of *Bowers v. Jones*, 1 Gill's Rep., 209, *Bowers* had obtained a judgment against *Jones* in the year 1826. In the year 1831, *Jones* obtained his discharge according to the Maryland statute. The form of the discharge may be seen in that case, p. 212. In 1835 *Bowers* sued out a *scire-facias* upon his judgment, to have execution. *Jones* showed for cause, against the *scire-facias*, that he had obtained his discharge under the insolvent laws, and that he had not since acquired any property by descent, &c. The jury found that the insolvent had acquired property since his discharge, by descent, &c., and the judgment of the Court was "flat executio."

There were other issues submitted to the jury, and the judgment was appealed from, and the Supreme Court of Maryland delivered a long opinion on other points involved in the cause. On these other points they differed with the lower court, and remanded the cause. But the history of the case in the lower court illustrates the effect of a discharge under the Maryland laws.

In 6 Gill and John., 120, it is said in the argument of Crain, one of the counsel, that "by the fifth section of the Act of 1805, any property acquired by gift, descent, or in any course of distribution, shall be liable to the payment of the insolvent's debts.

In 2 Gill's Reports, 177, will be found the form of a plea adopted by a person who had taken the benefit of the Maryland insolvent laws, and was sued for a debt contracted before his discharge. He pleaded that the plaintiff was only entitled to a qualified judgment to affect future acquisitions by gift, &c.

In 10 Gill and Johnson, 510, is reported a case in which there was a controversy between the trustee of the insolvent, performing the functions of the syndic with us, and his administrator, (the insolvent having died, and letters of administration having been granted upon his estate,) as to the right to a certain fund, which had come to the insolvent in course of distribution. The inferior Court decided that the trustee was entitled to the fund. The administrator appealed. *Mayer*, of counsel for the administrator, contended that the fund in question did not pass to the trustee, but was liable to the separate pursuit of every creditor of the insolvent, each of whom had the same right to proceed against it, which he would have had if no insolvent proceedings had been taken. This argument appears to have prevailed, for the Supreme Court of Maryland reversed the judgment of the inferior Court, and adjudged the fund to belong to the administrator.

In the case of *Gordon v. Turner*, 5 Har. and John. 369, an action was brought by a citizen of Maryland on a debt contracted in Maryland, between citizens of that State after the enactment of the insolvent laws, under which the debtor obtained his discharge. The debt was placed on the schedule of the insolvent. The debtor pleaded his discharge in bar of the action, and the inferior Court gave judgment for the defendant. On appeal, the Supreme Court reversed this judgment, and rendered one in favor of the plaintiff. The regularity of the insolvent proceedings was not impugned, so far as the report shows, and the reasons of the judgment do not appear. It is difficult to reconcile this decision with established principles, except upon the ground that the plaintiff was entitled to a judgment, notwithstanding the discharge, in order to enable him to levy on property that might come to the insolvent by gift, bequest, devise, descent, or in course of distribution.

Thus we perceive that the discharge, considered and held to be invalid in the case of *Boyle v. Zacharie*, was not a discharge of the debt, as the counsel for the defendant alleges; but merely a discharge of the person of the insolvent and such property as he might acquire after his surrender, otherwise than by inheritance or donation, *inter vivos* or *mortis causa*; a discharge entirely similar in principle to the kind of discharge pleaded in the case at bar. In both cases the person of the debtor, and a large portion of his future acquisitions are exempt from seizure, or even liability for the debts contracted prior to the surrender. And both systems of law, the Maryland and the Louisiana, afford the creditors a sort of remedy—the Maryland system being, in our humble judgment, much more favorable to the creditor. We never have heard of any creditor's having received a cent from the subsequent acquisitions of a Louisiana insolvent by the remedy provided by our statutes. The Maryland law would certainly, in some cases, pay the creditor out of the insolvent's subsequent acquisitions. There is not a creditor in the world who would not prefer the Maryland law, and yet the Maryland law was declared to be in violation of the Constitution of the United States. And why? Not because it discharged the debt, for we have shown it had no such effect; but because it exempted from liability for the insolvent's debts a large portion of his subsequent acquisitions of property. It did not exempt all, in all cases, no more than does our statute; and that was not the reason why it was declared unconstitutional. And, therefore, it is in vain to endeavor to support the constitutionality of our own insolvent laws by the suggestion that they do not exempt all the insolvent's subsequently acquired property from liability, in all possible cases, but only about as much as he is likely ever to acquire.

The counsel for the defendant argues, that the exemption of certain property of the debtor from liability for his debts, is a familiar thing, as, for instance, the exemption of his tools of trade, his clothing and necessary furniture. Ergo, he contends that the law-makers may properly exempt, from liability for debt, as much of the insolvent's property as is exempted by our insolvent laws. Every system of law, so far as we are informed, exempts from liability some articles of the debtor's property. The law does not sacrifice decency and humanity even to justice. It will not permit the creditor to strip his debtor absolutely naked. But the principle of this exemption is widely different from that which dictates that exemption of the future acquisitions of an insolvent,

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which is provided by our law. The law may, with propriety, allow a man bread, clothing, and shelter, even at the expense of his creditors; but to afford him and family a comfortable subsistence as long as any of the generation remain, at the expense of his creditors, is an entirely different thing.

What does the law mean by that provision which allows the insolvent to enjoy, free from the pursuit of creditors, so much of his property as will suffice for the comfortable subsistence of himself and family? It does not mean a comfortable subsistence for a day, month, or year. There is nothing in the provision of the law which limits the period for which the debtor and family are entitled to their support, and we should think that the law means that they and every one of them are entitled to their comfortable subsistence during their lives: that is to say, the insolvent is entitled to hold exempt from the pursuit of creditors such a capital as will yield a revenue sufficient to maintain comfortably all the members of his family, for at least one generation, without the necessity of one single day's labor on the part of any one of them. Could a prince ask more? And yet the law, which allows this, is attempted to be defended on the principle which forbids the creditor to strip his debtor of necessary clothing.

The obnoxious feature of the insolvent laws, declared to be unconstitutional in the cases of *Sturges v. Crowninshield*, *Ogden v. Saunders*, and *Boyle v. Zacharie et al*, was the exemption of the future acquisitions of the debtor from liability for the debt. The opinion of the Judges of the Supreme Court, more particularly expressed in the cases of *Sturges v. Crowninshield*, and *Ogden v. Saunders*, was, that a debtor in contracting a debt, bound for its payment, not only his present property, but any which he might thereafter acquire during the existence of the debt; and that any law which exempted from liability for the debt so contracted, the property of the debtor, whether owned at the time of its creation or afterwards, during its existence, was a law which impaired the obligation of the contract. And the constitutional objection is not removed by the suggestion that all the subsequently acquired property of the debtor under all possible circumstances, is not exempted. The difference between all, and that which is exempted under our statute, amounts to nothing in a practical view of the matter, and is absolutely no difference as to the constitutional principle involved.

In the case of *Sabatier v. his creditors*, 6 N. S. 585, the following question arose: *Brunetti* was a creditor of the insolvent for the amount of an irregular deposit left with the insolvent, while the law gave a privilege to the depositor for the restoration of the subject of the irregular deposit. But before the failure of *Sabatier*, the Civil Code was adopted, which denied a privilege for the security of the irregular deposit, or more properly speaking, abolished that species of contract before that time recognized as the irregular deposit. And the question was, whether or not *Brunetti*, in consequence of that change of the law, had lost his privilege, and it was discussed at great length by *Judge Porter*. He argues, that if the change of the law, provided it were suffered to have effect, would impair the obligation of the contract, then it could not be suffered to have effect. For the Constitution of the United States protects the obligation of the contract. He then proceeds to say: "Now, in the ordinary case of a promise to pay a certain sum of money on a particular day, the obligation of the contract is that the debtor shall discharge the debt at the period fixed, or that, in default thereof, his property shall be responsible to satisfy his engagement. We are aware that a few have contended that there is no implied obligation to make the property liable in a contract of the kind just mentioned; but we apprehend such a ground is quite untenable. Indeed, we do not see how it can be maintained, without reducing the obligation from a legal to a moral one, since a right without a legal remedy ceases to be a right. If by the contract, the property of the debtor did not become and was not, as between creditor and debtor, to be placed out of legislative control, there would be scarcely anything left for the prohibition in the Constitution of the United States to act on. It cannot be believed the framers of it intended to guard against the States passing laws which might add to or take from the amount to be paid and change the time of performance, and leave them a power which would enable them to say, the debtor should be entirely released, both in person and property, from his engagement."

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"In the case of *Sturges v. Crowninshield*, in the Supreme Court of the United States, it was admitted in argument, that all the present property was responsible to the creditor; but it was urged that the obligation did not go so far as to make future acquisitions subject to it. The Court, however, said that both present and future were; and to release the latter from liability impaired the obligation of the contract. In the case of *Green v. Biddle*, they declared that any law introducing a deviation from the terms of the contract, by postponing or accelerating the period of performance, imposing conditions not expressed in the contract, or dispensing with those that were violated by obligation. 4 Wheaton, 122, 8 Wheaton, 1."

"We take it, therefore, as clear, that in the case of an ordinary obligation to pay money, a law passed, subsequent to the contract, which would exempt all a man's property from the payment of the debt, would be unconstitutional; and that it would be equally so if a part of it was placed out of the reach of execution, provided the portion left liable was not sufficient to satisfy the debt."

It cannot be denied that if the defendant had obtained a discharge, and that had been pleaded in bar of our action, there would have been no distinction between the character of the insolvent laws in question and those which have been considered by the Supreme Court of the United States in the leading cases on this subject. The distinction, then, would not have been in the character of the insolvent laws and insolvent proceedings, but if any at all, in the facts of the case. But if we would not be bound in case of an absolute discharge, we ought not to be bound at all. For if a party be bound by judicial proceedings at all, he is bound by whatever result there may be. It cannot be that a party is not bound by the result, if extremely unfavorable, and bound if favorable or less unfavorable.

There is another very simple test. Would the law in question and the discharge under it be valid, as applied to contracts made before the law? That question is most satisfactorily answered in the negative by the decisions in the following cases: *Sabatier v. his creditors*, 6 N. S. 585; *Bronson v. Kenzie et al.*, 1 How. S. C. R. 311; *Green v. Biddle*, 8 Wheaton, 1; *Sturges v. Crowninshield*, 4 Wheaton, 122; *Farmers' and Mechanics' Bk. of Pa. v. Smith*, 6 Wheat. 131. In the latter case, both the plaintiff and defendant were citizens of the State where the contract was made, the law passed, and the discharge had. These decisions all affirm the doctrine, that any law which so impairs the remedy as to make its exercise ineffectual, impairs the right itself, and, if applied to prior contracts, violates the constitution of the United States. Such a law is unconstitutional with regard to prior contracts, even as respects the citizens of States where it may be passed. Now, in *Ogden v. Saunders*, we have this additional principle, that a discharge which in its application to prior contracts, is unconstitutional, as among the citizens of the State where it is granted, is unconstitutional with regard to all contracts, whether prior or posterior, as respects the citizens of other States. "For," says the Judge who delivered the opinion of the Court in that case, "the purport of this adjudication, as I understand, is that as between citizens of the same State, a discharge of a bankrupt, by the laws of that State, is valid as it affects posterior contracts; that as against creditors, citizens of other States, it is invalid as to all contracts." Observe also the reasoning of the Court from about the middle of page 365 to the conclusion.

We have so far been discussing the question, whether or not the insolvent acts, so far as the defendant claims their benefit, is a mere lawful modification of the remedy, or a law impairing the obligation of a contract, and whether or not there is anything in the nature of the laws and insolvent proceedings pleaded by the defendant, which distinguish them from those so frequently passed upon by the Supreme Court of the United States. And we think we have conclusively shown that if there be any distinction between the case at bar and those cited and relied on in our brief on file, that distinction is, at least, not to be found in the character of the insolvent laws and insolvent proceedings pleaded. We will proceed presently to inquire whether or not such a distinction is to be found in the facts of the case. But first, we will take the liberty to set the learned counsel for the defendant right as to another matter wherein he has erred.

The learned counsel for the defendant says, that "not a single case has been cited in which a State Court has refused to be governed by its own insolvent

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laws, when applied to contracts made under them; not one in which it has been held that such laws should not be applied in the Courts of the State. All of the cases relied upon by the plaintiffs were either in Courts of the United States, or in Courts of States other than that in which the insolvent proceedings, set up in defence, had taken place." See the counsel's brief, page 11, also p. 6.

We will furnish a case. In *Sacoye et al v. Marsh et al*, 10 Metcalf, 594, the cause of action was a promissory note, made in Massachusetts. The suit was brought in a Massachusetts Court, and the defendants pleaded insolvent proceedings had in that State. So far the case is precisely analogous to the one at bar.

It was also similar to this case in another respect. The party through whose endorsement the plaintiffs derived title, were citizens of the same State in which the contract was made and the insolvent proceedings were had, and had no cause of action whatever against the prior parties to the note. For the note was made by *Marsh, Hovey & Glines*, and endorsed by them under the name of *Wm. H. Marsh & Co.*, to the plaintiffs, who were citizens of New York. In its opinion, the Court referred to the case of *Braynard v. Marshall*, 8 Pick. 194, with approbation—that very case with which the learned counsel finds fault, and to whose refutation he has invoked the authority of *Judge Story*, citing his work on bills. The Court, in its opinion, dissipated another of the illusions of the learned counsel, that the rule which we invoke was a rule for the Federal Courts, or the Courts of other States than that in which the insolvent proceedings were had, and not a principle of law to be followed by all Courts alike. The Supreme Court of Massachusetts, in the year 1846, with all the lights of arguments and authorities of which the counsel invokes the benefit, decided, "that this restriction upon the power of the individual States, limiting the operation of their insolvent laws to their own citizens, is to be as much regarded by the State judicial tribunals as by the Federal Courts." And they cite 6 Wheat. 131; 1 Bald. 296; 4 Gill. & John. 509, in support of their opinion. To the same point we will cite *Cook v. Moffat et al*, 5 How. S. C. Rep. 308. In this latter case the Supreme Court of the United States says, "when this Court has declared State legislation to be in conflict with the Constitution of the United States, and, therefore void, the State tribunals are bound to conform to such decision." But to return to the case in 10 Met. 594. The Supreme Court of Massachusetts proceeds to say: "The case of *Braynard v. Marshall*, 8 Pick. 196, was a case where the action was instituted in a different State from that which had enacted the insolvent law; and it may be supposed that, for this reason, the discharge under the insolvent laws of New York was held inoperative in that case; but we apprehend that the decision was placed upon the broad principle that the discharge, under the insolvent law of New York, was held inoperative everywhere, except as against citizens of the State of New York; and that if such suit had been instituted in the State of New York by the same party, (a citizen of Massachusetts,) the tribunals of New York would, under the decisions of the Supreme Court of the United States, have held a discharge obtained under their laws inoperative, as respects a citizen of Massachusetts."

"The promissory note, which is the subject of the present action, (we still quote from 10 Met. 594,) was made by the defendants at Boston, payable in ten days after date, to the order of *W. H. Marsh & Co.*, and endorsed by the payees to the plaintiffs, who then were, and still continue to be citizens and residents in the State of New York. The note was not upon its face made payable at any particular place, and was, therefore, legally payable to the holder. The makers of this note, by giving it a negotiable character, contracted with whomsoever might be the legal endorsee, at the time it became payable, to pay him the same; and the plaintiffs having become such endorsees, it is to all intents and purposes a contract with a citizen of the State of New York, and to be dealt with as any other contract made by a citizen of Massachusetts with a citizen of New York. We are, therefore, of opinion that, upon the facts stated by the parties, the plaintiffs are entitled to judgment." We cited this case for the purpose of showing the error of the learned counsel for the plaintiffs, in saying that there was no case in which a State Court had held a discharge in its own Courts inoperative, and that all the cases relied upon by the plaintiffs were cases decided by the Federal Courts, or the Courts of other States than that in which the insolvent proceedings, pleaded in defence, had taken place.

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But your honors will perceive that the decision sustains our action in every particular, and, like the case of *Braynard v. Marshall*, proves that the bill upon which we have sued is not payable at any particular place, nor to any particular person, but to any *bona fide* holder, wherever he may reside. And that if such an instrument be transferred to a citizen of another State before its maturity, he can recover upon it, notwithstanding the discharge of the parties thereto under the insolvent laws of the State where the instrument was made, even in the Courts of that very same State.

In further support of our views, there are other cases, if we mistake not, in which the State Courts have held discharges under their own insolvent laws invalid, on the ground of the repugnancy of those laws to the Constitution of the United States.

The case of *Frey v. Kirk*, 4 Gill and Johnson, 510, is in point, if we mistake not. This volume is not before us, and it is possible we may be mistaken.

At page four of his brief, the counsel for the defendant says, "the plaintiffs acquired the right of the assignee (*i. e.* *Mr. Hunton*) and nothing more." We purchased the bill for valuable consideration before its maturity, and at that time there was no defence to it, and we stand upon the same footing with any *bona fide* purchaser of a negotiable instrument, before maturity, without notice. For at that time there was no defence or latent equity of which we could have notice. The defendants seek to charge us with a defence that arose after our purchase, which would have been good against *Mr. Hunton*, had the bill remained his property. This doctrine of the learned counsel is at variance with the law-merchant in relation to negotiable instruments, as we understand it, and was certainly overruled in the cases of *Braynard v. Marshall*, 8 Pick., 194; *Towne et al. v. Smith*, 1 Woodbury & Minot, 118; *Savoie et al. v. Marsh*, 10 Metcalf, 594; *Baker v. Wheaton*, 5 Mass., 509; *Watson v. Bourne*, 10 Mass. 337. We have, however, argued this point fully in our brief on file.

In the case of *Braynard v. Marshall*, the action was upon a note executed by the defendant, who was a resident of New York, in that State, to another resident of the same State, who endorsed it to the plaintiff, a citizen of Massachusetts. Chief Justice Parker says: "The case before us is that of a negotiable promissory note, given in the first place by a citizen of New York to a person resident there, by whom it was immediately endorsed to a citizen of Massachusetts. The defendant had obtained a discharge in the State of New York, the domicile of himself and the payee, and pleaded it in bar of the action." It is true the action was not brought in the State where the discharge was granted, but that circumstance is immaterial, as appears by the decision in the case of *Savoie et al. v. Marsh*, 10 Met., 594. The Court, in its opinion, refers to the case of *Oyden v. Saunders*, as ruling the one before them, but proceeds to say that, independently of that decision, the defence set up could not prevail. "A negotiable instrument made in New York, and endorsed for a valuable consideration to a citizen of Massachusetts, before an application for the benefit of the insolvent law, ought not to be discharged under the process provided by that law. It is a debt payable anywhere by the very nature of the contract, and it is a promise to whoever shall be the holder of the note." This is the same doctrine held in the case of *Savoie et al. v. Marsh*, before cited, and in accordance with the cases of *Baker v. Wheaton* and *Watson v. Bourne*, also cited.

The case of *Towne et al. v. Smith* was a bill of injunction filed by *Towne et al.*, assignees of *Horne and Howe*, insolvents, who had taken the benefit of the insolvent laws of Massachusetts, to prevent *Smith* from proceeding at law to collect a debt out of the assets of the insolvents, by attachment in the United States Circuit Court, for the District of Massachusetts. The action enjoined was pending in the same Court. *Smith*, the plaintiff, was a citizen of New York, and his suit was based on a note drawn by by *Horne & Howe*, the insolvents, residents of Massachusetts, payable to their own order, by themselves endorsed in blank, and given to *William A. Howe & Co.*, also citizens of Massachusetts, in payment of a pre-existing debt due them from the makers. *William A. Howe & Co.* carried the note to New York and sold it there, for a good consideration, to *Smith*, who resided in New York. *Smith* commenced his suit against *Horne & Howe*, the insolvents, in the United States Circuit Court for the District of Massachusetts, and attached the property of *Horne & Howe* thereon. *Horne & Howe* applied for the benefit of the insolvent laws of Massachusetts,

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were discharged from their debts, and *Towne et al.* were appointed their assignees. *Towne et al.* then filed their bill in equity, praying that *Smith* be enjoined from proceeding with his action. Judge *Woodbury* delivered an elaborate opinion, and concluded by declaring that he was compelled by the authority of the cases decided in the United States Courts, to dismiss the bill of the assignees. This is another case directly in point, the only difference from the one at bar being this, that it was decided by a Federal Court. But we have just seen that this is an immaterial difference.

But we have no doubt, independently of all other considerations, that the case of *Ogden v. Saunders* rules the one before the Court. In that case, the seven Judges who sat during the hearing, delivered opinions on the general question of the power of the States to pass insolvent laws. Judges *Washington*, *Thompson*, *Trimble* and *Johnson* were of opinion that the States had the power. Judge *Marshall*, with whom concurred Judges *Story* and *Dwight*, expressed the opinion that the States had not the power. Afterwards, Judge *Johnson* delivered the opinion which disposed of the case.

He considers the question of the validity of the discharge there pleaded, both in an international and constitutional point of view. In the latter point of view, he contended that the clause of the Constitution of the United States, which gives the Federal Courts jurisdiction of controversies between citizens of different States, was intended to prevent the assertion by State Courts and State laws of the power to discharge, by insolvent proceedings, debts due citizens of other States. See his argument, from page 364 to the end of his opinion. We would be glad to incorporate it in our brief, but that it is too long. The reasoning applies entirely to the present case. You will observe that his position is, that the jurisdiction of the Federal Courts to try suits between citizens of several States, was conferred with a view to protect the citizens of other States from the unfair legislation of any particular State in the way of insolvent laws. And it is important in this connection to remark that the Constitution of the United States confers the jurisdiction to try this case upon the Federal Judiciary, and that we might have brought this suit in the Circuit Court of the United States, but for the failure of the judiciary act to provide for its cognizance by the Circuit Court. The want of jurisdiction in the inferior Federal tribunals, is not owing to the Constitution of the United States, but to the judiciary act. Sec. 2, Art. 3 of the Constitution of the United States, and the following cases: *Turner, administrator v. Bank of North America*, 4 Dal.; argument of *Rawle*, of counsel, and remark of Judge *Chase*, in note p. 10, 1 Paine's C. C. R. 45. And by the 25th section of the Judiciary Act of 1789, there is a writ of error to the Supreme Court of the United States from the judgment of your honors if unfavorable to us. So that the argument of Judge *Johnson*, based on the jurisdiction of the Federal Courts, applies with full force.

In conclusion, he says: "I therefore consider the discharge under a State law, as incompetent to discharge a debt due a citizen of another State; and it follows that the plea of a discharge here set up, is insufficient to bar the rights of the plaintiff." * * *

"And the purport of this adjudication, as I understand it, is that as between citizens of the same State, a discharge of a bankrupt by the laws of that State is valid, as it affects posterior contracts; that as against creditors, citizens of other States, it is invalid as to all contracts."

"The propositions which I have endeavored to maintain in the opinion which I have delivered, are these:

"1. That the power given to the United States to pass bankrupt laws is not exclusive.

"2. That the fair and ordinary exercise of that power by the States, does not necessarily involve a violation of the obligation of the contract *multo fortiori* of posterior contracts.

"3. But when in the exercise of that power, the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which render the exercise of such a power incompatible with the rights of the other States, and with the Constitution of the United States."

The case of *Shaw v. Robbins*, 12 Wheaton, 369, in note, was precisely similar, except that it was begun in a State Court, was carried to the highest State Court

to which it could be carried, there decided adversely to the plaintiff, and then to the Supreme Court of the United States, by writ of error, under the provisions of the 25th section of the judiciary act.

At page 348 of 6 Peters, it appears that before the case of *Boyle v. Zacharie et al.* came up for trial, *Mr. Wirt*, in behalf of the plaintiff (*Boyle*) in error, "inquired of the Court whether the opinion of *Mr. Justice Johnson*, delivered in the case of *Ogden v. Saunders*, 12 Wheat., 213, was adopted by the other Judges who concurred in the judgment in that case."

Mr. Chief Justice Marshall said, "the Judges who were in the minority of the Court upon the general question as to the constitutionality of State insolvent laws, concurred in the opinion of *Mr. Justice Johnson*, in the case of *Ogden v. Saunders*. That opinion is, therefore, to be deemed the opinion of the other Judges who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the Court."

In the decision of the same cause, p. 642 of the same volume, *Judge Story*, the organ of the Court on that occasion, makes a similar remark.

But the plaintiffs were not parties to the session. Their name does not figure on the bilan as that of a creditor. The bill, it is true, is described, and is the first one occurring in the list of bills payable. But *A. S. Trotter*, agent of the Northern Bank of Kentucky, is named as the holder. *Mr. Trotter* had no authority to represent us in any judicial proceeding, and this was a suit by the insolvent against those of his creditors who were placed on his schedule. They were the parties defendant; and if *Mr. Trotter* had no authority to represent us, we are not parties, and would not be so considered, although domiciliated in this State. The agency of *Mr. Trotter* is not shown, and cannot be presumed or inferred from the defendant's own statement to that effect.

Fortier v. Field, 17 L. R., 587.

Jacobs v. Sartorius, 3 An., 9.

It has been decided that a holder of negotiable paper is not bound by insolvent proceedings, unless he is placed on the bilan as a party, although the paper itself is described.

Herring v. Levy, 4 N. S., 383.

Clarke v. Wright, 5 N. S., 123.

But if it be said that we are properly in court, through the medium of *Mr. Trotter*, as our agent, then he, being a resident of the city of New Orleans, was entitled to notice as a domestic creditor; and it does not appear that any notice was ever given to him or any other creditor.

None of the creditors have ever had the notices required by the law, so far as the record shows, and therefore none of them are bound except those who have made themselves parties voluntarily.

It thus appears the defendant claims the benefit of judicial proceedings, which he conducted against his creditors, without citing any one of them.

But, even if all of our arguments fail, the judgment of the lower Court is still wrong, and not consistent with the reasoning which the learned Judge adduced to support it.

His reasoning goes to show that no State Court in Louisiana can give us a judgment; and yet he does not non-suit us, but declines jurisdiction, and orders our suit to be transferred to the Fifth District Court, and there cumulated with the insolvent proceedings. Why send us to another Court, just as powerless, according to the argument, to give us relief as the one from which we appealed? We pray your honors to give a final judgment for us, if we are entitled to it; but, at all events, a final judgment. According to the views of the Judge of the District Court, the judgment should have been one of non-suit.

Johnson, for defendant:

Some weeks after this case was submitted to the late Supreme Court, a supplemental brief was filed by plaintiffs, on the seventeenth page of which a new question of fact is raised. "None of the creditors," it is said, "have ever had the notices required by the law, so far as the record shows, and therefore none of them are bound, except those who have made themselves parties voluntarily. It thus appears the defendant claims the benefit of judicial proceedings, which he conducted against his creditors without citing any one of them."

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The plaintiffs show by their corporate name, by the allegations in their petition, and by evidence, for the express purpose of avoiding the effect of the insolvent proceedings whose validity is now for the first time questioned, that they are not and were not domiciliated in this State, and therefore could not be directly cited here. Neither party, on the trial of the case before the District Court, thought of inquiring for the Sheriff's return of notice to the creditors domiciled in the parish of Orleans. The regularity of the proceedings was admitted, as is stated by the District Judge in his opinion. The brief of the counsel for plaintiffs, which he had prepared for the District Court, the only brief on file when the case was tried before this Court, contains no intimation of the existence of any such issue. An appellate Court cannot be called on to decide issues thus first sprung upon it, as if it were a Court of original jurisdiction, long after the submission of the case to it as an appellate tribunal. If it considers the issue material and legally raised at this stage of the proceedings, it is presumed it will remand the case. The missing return, showing notice to the resident creditors, can now be produced. We do not pretend that the plaintiffs were notified as resident creditors. The law says, "if any of the creditors reside out of the territory, the Judge shall appoint a counsel to represent them in the meeting of creditors." Old Code, p. 438, Art. 4, Sec. 3. This is the law referred to in Sec. 8, of the insolvent law of 1817. Art. 3055, of the Code of 1825, not in the Old Code, is declaratory of the law implied in the above citation from the Old Code. "Absent creditors, and who are not domiciled in the State, are not in any case summoned to the meeting. They are to be represented by an attorney, &c."

The record shows that *Mr. Bayne* was appointed, and that he attended the meeting of the creditors and did his duty.

There is another category of creditors entitled to a summons to the meeting of creditors, respecting whom the record, even accompanied by a full sheriff's return, could show nothing. Creditors residing in the State, but out of the parish, are summoned by the notary, by letters addressed to them, but no return, certificate or record of this summons is ever filed in Court. The law, moreover, requires publications in newspapers, calling creditors to attend the meeting, but proof that they were made is never filed in Court, unless called for by some proceedings out of the usual course.

All these steps are essential to the regularity of the proceedings, and the omission of them would probably provoke opposition to the cession in its earliest stage. In the absence of such opposition, in the absence of any charge or allegation impugning the good faith of the insolvent, or his manner of conducting the cession, were we called upon to prove more than that there was a cession, and that the plaintiffs were made parties to it in the only way in which absent creditors can be made parties? The plaintiff's petition and supplemental petition show that they anticipated the defence which was set up, and sought to evade it by invoking the protection of the Constitution of the United States. With such pleadings under our system, we have shown enough to entitle us to the benefit of the presumption *omnia recte acta*. The plaintiff's course corroborates the presumption. If the Court should be of a different opinion, we ask that the case be remanded, that the regularity of the *concurso* may be fully established.

In the long discussion of authorities previously quoted and considered, we shall not follow the supplemental brief. *Saroye v. Marsh*, 10, Met. 594, is a new authority, the effect of which could be more correctly estimated, if the clear and concise statement of facts had not been unfortunately omitted. We will supply the omission.

"Assumpsit on this note. Boston, Oct. 3, 1848. Ten days after date we promise to pay to the order of *W. H. Marsh & Co.*, \$256, value received.

(Signed,)

MARSH, HOVEY & GLINES."

The parties submitted the case to the Court on the statement of facts which follows; the defendants made the note declared on, and endorsed it by the name of *W. H. Marsh & Co.* to the plaintiffs before its maturity. The defendants then were, and for a long time afterwards continued to be, inhabitants of Lowell in this Commonwealth. The plaintiffs then were and ever since have been co-partners in business, and inhabitants and residents of the State and city of New York."

The rest of the statement shows that two of the defendants obtained, in 1844, a certificate of discharge under the insolvent law of Massachusetts, and that the question submitted to the Court was, whether as to them, under these facts, the plaintiffs could maintain their action.

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This is a wholly different case from ours. It comes strictly within the purview of the case of *Ogden v. Saunders*. The Court decides it on that ground.

But after disposing of the case on that ground, *Justice Dewey*, who was the organ of the Court, proceeds to make a variety of remarks, some of which, quoted on p. 12 of the supplemental brief of plaintiffs, appear to be founded on a confused idea of the facts of the case, and to be wholly uncalled for in its decision. We have shown that the makers and payees of the note, were one party, and the endorser, the other, with whom the former directly contracted. *Judge Dewey* seems to assume that there were three parties, and that a negotiable contract between the first and second, was assigned to the third by endorsement. He then expresses the opinion, that a contract with a fellow citizen, in negotiable form, might be discharged by the insolvent act of the State where it was made, so long as the obligee, or any citizen of the same State held it, but would not be so discharged after assignment to one not a citizen of the State. The contract is born with the seeds of destruction in it, but they are rendered inoperative by removal from its native atmosphere. It claims from the Constitution of the United States protection in the hands of one class of citizens, which is denied to it in the hands of another. The law, governing it, is not impressed upon it at the time it is made, but is determinable afterwards, at the will of the creditor, and is indeed subject to constant mutations, as nothing prevents a note or bill, or any other contract, from being passed backwards and forwards several times, between the protected and the unprotected classes of holders.

Such is the doctrine of the dicta in this case, and in *Braynard v. Marshall*, which the plaintiffs invoke against us, or it is nothing at all. No wonder that *Story* so earnestly refuted it in the Sect. 166 et seq. of his work on Bills, cited in our original brief. If law is a rule, that cannot be law which makes the legal effects and incidents of contracts variable and determinable, at the will of the creditor, at any time after the contract is made.

The facts in *Braynard v. Marshall* did not call for such expressions of opinion any more than those of *Saroye vs. Marsh*. There was in that case no real party between the New York defendant and the Massachusetts plaintiff, who for goods sold to the former by his agent, received a note of the former, made payable to the agent's order it is true, but immediately endorsed and delivered to the plaintiff, as the defendant was informed it would be. It was a contract in which the consideration moved from the plaintiff, a citizen of Massachusetts, while the obligation was made by the defendant, a citizen of New York, with the knowledge that it was to go to the plaintiff. It was thus within the case of *Ogden v. Saunders*. The decision of the case was rested on the ground, that a discharge by a New York insolvent law could have no effect in Massachusetts. This is impliedly contrary to the theory propounded in *Saroye v. Marsh*, and in *Cook v. Moffat*, that a discharge which is good in one forum is good in every forum, and that one which is unconstitutional, is to be held so by the Courts of the State which gave it, as well as in the Courts of the United States, and of those of other States of the Union. We make this observation by the way. The principal object of our remarks on the cases of *Braynard v. Marshall*, and *Saroye v. Marsh*, is to show that they were in reality like the case of *Ogden v. Saunders*, and were decided on grounds not applicable to the case before this Court; that whatever opinions in those cases seem to favor the views of the counsel for plaintiff, are mere dicta, founded on a misconception of the facts, at any rate, uncalled for in either case. These dicta are refuted by *Story*, in the passages cited, not merely by the most cogent reasoning, but by the highest authority. Among the authorities cited by him is that of *Ory v. Winter*, 4 N. S. 277.

That the Supreme Court of Massachusetts intends to go no further than the case of *Ogden v. Saunders* clearly carries it, and even so far goes unwillingly, is fully and forcibly stated in the late decision made by that Court in the case of *Brigham v. Henderson*, 1 Cushing (Mass.) Rep. 430. But not for this reason only do we call the attention of the Court to this case.

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In it, the idea that the plaintiff, who resided in Massachusetts when the acceptance was given, could, by removal to New Orleans, avoid the effect of the discharge by the insolvent law of Massachusetts, is ably refuted in this language:

"If his (the plaintiff's) removal from Boston to New Orleans would enable him to avoid the defendant's discharge, so would the removal of a creditor across the line of a State, (however small the distance,) enable him to do the same; thus making the operation of the insolvent law upon contracts made between debtor and creditor, citizens of the Commonwealth, to depend upon the will of the creditor. In the language of the late *Mr. Justice Hubbard*, with reference to another subject, (4 Met. 404,) it will be time enough to yield in this matter of State jurisdiction when the question of right has been determined by the highest tribunal."

What difference would there have been, in our case, between *Mr. Hunton* removing to Kentucky with our acceptance, and his selling it to a citizen of Kentucky? In either case it would be to make "the operation of the insolvent law between debtor and creditor, citizens of the commonwealth, to depend upon the will of the creditor."

There is but one other point that we intend to notice. The counsel for plaintiffs complains that he was not non-suited. But he has not shown in what manner he is aggrieved by a judgment which might, under some circumstances, be more favorable to him than a non-suit, under no circumstances less so.

In giving judgment declining jurisdiction, the Court gave one equivalent to non-suit, and the further order to cumulate the suit with the proceedings in the concurso, in no manner obliges the plaintiffs to pursue their claim there. If he was not aggrieved by the judgment given, although it contained surplusage, or an order equivalent to a permission or privilege, of which he does not wish to avail himself, or an order which was incorrect or uncalled for, there is no reason why we should be saddled with the costs of an appeal. The language of Articles 571, 573, 592, 888, 889, C. P., sustains this equitable view. The judgment of the Court says there was a concurso to which you were made a party, and this claim of yours was provable under it. If you have any remedy under that, I give you the benefit of it by referring you to the only Court in Louisiana which can administer it. You have neither alleged nor shown grounds for ordering a new surrender, which is the only case in which this Court could aid you, and, therefore, it dismisses you. We say that this was a proper judgment, that if the reference to another Court was superfluous, it could do the plaintiff no prejudice.

We sum up with the points made in our original brief, and which, we think, we have maintained:

That if we had been discharged under the insolvent act, it would have been no infringement of the Constitution of the United States, and, *a fortiori*, that the modification of the remedy, sole benefit of the Act which we contend for, is constitutional, and should be secured to us by the Courts of the State.

The plaintiff, having failed to show that he was aggrieved by the judgment appealed from, we ask that the judgment be affirmed, with costs.

OGDEN, J. The defendant, a citizen of Louisiana, resists a suit instituted by the plaintiffs, citizens of Kentucky, to recover the amount of a draft accepted by a commercial firm of which he was a member, on a plea in the following words: "That since the execution and protest of said draft, to wit, some time in the year 1850, defendant made a cession of all his property to his creditors, under the provisions of the Act of February 20th, 1817, relative to the voluntary surrender of property, and of the Acts amendatory thereof, and of the Civil Code of Louisiana, to which proceedings the plaintiffs were made parties, under the provisions of said laws—that a stay of all proceedings against the person and property of defendant was granted by order of the Fifth District Court of New Orleans, before which said cession was made, and that said order has never been set aside." The present suit is alleged to be in violation of that order and of the law under which the contract sued on was made. The bill is dated at New Orleans, drawn by *L. Jantin*, a citizen of Louisiana, on *Laforest*.

& Squires, at New Orleans, and made payable to the order of *Benjamin Winchester*, and has on it the blank endorsements of *Benjamin Winchester* and *Miles Taylor*. The parties, whose names are to the bill, were all citizens of Louisiana at the time, and the acceptors were commission merchants residing and doing business in New Orleans. The bill was accepted and endorsed for the accommodation of the drawer, precisely in the shape in which it appears now in the record. *Logan Hunton*, also a citizen of Louisiana, became the owner of it, and sent it to Kentucky, where it was bought by the plaintiffs. The name of *Hunton* is not on the bill.

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The case has been argued with much zeal and ability on the question of the effect and validity of the insolvent laws of the State, and the judicial proceedings which have taken place under them, as affecting the right of the plaintiffs, citizens of another State, under the circumstances of this case, to prosecute this suit in a Court of this State, notwithstanding the order staying all proceedings against the person and property of the defendant. A question, however, has been raised in this Court which does not seem to have been considered in the Court below, and which it is necessary first to dispose of. It is denied that the plaintiffs were duly made parties to the proceedings in bankruptcy, instituted by the defendant. This was undoubtedly essential to give validity to the plea which has been set up. The bill is found in the Schedule of defendant's liabilities, and the holder of it is represented to be *A. S. Trotter*, agent of the *Northern Bank of Kentucky*. *Trotter* is not represented as either being present, or residing in New Orleans, and the personal service on him, which the plaintiffs contend should have been shown, we think was not necessary. Counsel was appointed to represent the absent creditors, and that is the only formality required by law to make absent creditors parties in cases of voluntary surrenders. Acts of 1817, p. 180. The bill was then in suit in the United States Court in New Orleans, in the name of the present plaintiffs, and in the description a special reference was made to that suit. The plaintiffs were, therefore, legally parties to the proceedings, and we will now proceed to consider the argument and authorities which have been submitted to us on the merits of the plea.

The order of the Court, made under the authority of a sovereign State, accepting the surrender of defendant's property and staying all proceedings against him, must preclude any creditor from instituting a suit in a Court of this State, unless the law itself is a nullity. The argument of the counsel for plaintiffs is not understood as contending for the absolute nullity of the law, for it seems to be conceded everywhere to be now well settled, that State insolvent or bankrupt laws, as to contracts posterior to those laws, are valid and binding between citizens of the State where such laws exist as to contracts made and to be performed in the State. But the State, in its sovereign capacity, can exercise the fullest authority over its own tribunals, and prohibit citizens of other States from suing in them on contracts made, either in or out of the State, unless there is some superior power by which her authority in this respect is circumscribed. The State has declared her will on this subject. Her insolvent laws expressly extend their operation to all persons, whether citizens of other States or foreigners; and all contracts are declared to be affected by them, whether made in or out of the State, or to be performed in or out of the State. The plaintiffs claim an exemption from the operation of this law as regards them, which they can only be entitled to by showing either that the

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whole law is repugnant to the constitution of the United States, and, therefore, void, or that by the effect of some clause in the constitution, so much of the law as prohibits them from suing in the Courts of the State, is inoperative. The right of the several States to pass bankrupt laws so long as Congress refrained from exercising the power given to them, by the constitution, of passing uniform bankrupt laws, has never been questioned since the decision in the case of *Sturges v. Crowninshield*, 4 Wheaton. It was there held that the States might pass bankrupt laws, provided they did not violate the 10th sect. of the 1st article of the constitution of the United States, which declares that no State shall pass a law impairing the obligation of contracts. Judge Marshall, in delivering the opinion of the Court in that case, says, the constitution did not grant to the States the power of passing bankrupt laws, it found them in possession of that power, and restrained them so far as to prevent them from passing laws impairing the obligation of contracts. He also declares, in that opinion, that the insolvent laws existing in the different States at the adoption of the constitution, which went further than discharging the person from imprisonment, were obnoxious to the constitutional prohibition. According to the opinion expressed in that case, the insolvent laws of this State would be repugnant to the constitution of the United States, and would be void, as well in regard to our own citizens as in regard to the citizens of other States. It is, however, well known that the whole subject of the constitutionality and effect of State bankrupt laws came afterwards under review in the leading case of *Ogden v. Saunders*, 12th Wheaton—and that it was then decided by the Court, that a discharge under a State law, when the contract was made between citizens of the State under whose law the discharge was obtained, should be held to be valid. In regard to citizens of other States, the Court says: "But when the State passes beyond its own limits and acts upon the rights of the citizens of other States, there arises a conflict of sovereign power, and a collision with the Judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the constitution of the United States." Judge Marshall, who had delivered the opinion of the Court in the case of *Sturges v. Crowninshield*, assented to this judgment, and the constitutionality and validity of State bankrupt laws in its effects on posterior contracts to the extent of even entirely discharging the obligation, was established by that decision. The case of *Ogden v. Saunders* presented the question, whether *Ogden*, who had obtained a discharge in New York under her insolvent laws, could successfully plead that discharge in bar of a suit instituted against him in the United States Court at New Orleans by *Saunders* on a bill drawn by *Jourdan*, at Lexington, in Kentucky, on *Ogden*, then a citizen and resident of New York, and there accepted by him. The Court held that the fair and ordinary exercise, by the States, of the power to pass bankrupt laws, did not necessarily involve a violation of the obligation of contracts, but that the exercise of that power, as regarded the rights of *Saunders*, a citizen of a different State from the one under whose laws the discharge had been granted, was incompatible with the rights of other States—and held the discharge set up to be invalid. From the language made use of in the propositions, as above stated by the Court, it would seem that they considered the rights of the State to pass such laws as only circumscribed in so much as by the constitution of the United States the Federal Courts were clothed with the power of deciding controversies between citizens of different States. In the

previous case of *Sturges v. Crowninshield*, where the same law of New York was held to be unconstitutional, and where the contract was in fact made prior to the law granting the discharge, *Judge Marshall* had deemed it proper to say that the opinion was confined to a case in which a creditor sues in a Court, the proceedings of which the Legislature, whose act is pleaded, had not a right to control; thereby strongly intimating the opinion that the Legislature of the State would necessarily exercise an absolute control, so far as concerned the Courts of the State. It is principally on the reasoning adopted by the Court in the case of *Ogden v. Saunders*, and on the authority of the case of *Zacharie v. Boyle*, 6 Peters R. 635, together with a decision of *Judge Woodbury*, in the Circuit Court of the United States, and numerous decisions of State Courts—that the plaintiffs' counsel have based their argument to contend that defendant is amenable before our own Courts at the suit of citizens of another State. We have examined the cases referred to, and particularly the case of *Towne et al v. Smith*, 1 Woodbury & Minot, 118, in which *Judge Woodbury* has reviewed, at great length, all the decisions on that subject. The result of that examination is, we think it to be settled by judicial authority, 1st. That the insolvent or bankrupt laws of a State, if not suspended by the enactment of a uniform bankrupt law by Congress, are constitutional and valid as to all posterior contracts entered into between citizens of the State where such laws exist, and equally so whether they affect the obligation or the remedy only. 2d. That a discharge granted under such laws, as between citizens of the State where the discharge is granted, and as to contracts made and to be executed there, is valid and binding every where. 3d. That it is only in regard to contracts made between citizens of different States, and not stipulated to be performed in the State where the discharge is granted, that the validity of such discharge can be questioned, if at all, in the Courts of the State where it was granted, although in the Courts of the Circuits of the United States, according to their existing jurisprudence, a discharge, under those circumstances, would not be held good as a plea in bar.

The two first propositions are established by all the authorities, and their correctness now can scarcely be questioned. The third proposition is the one which directly involves the right of the plaintiffs to maintain this action. Their counsel contend that their case is not embraced by it; that the contract sued on was made between a citizen of Louisiana and citizens of Kentucky, and that as no place of performance is indicated in the contract, Louisiana cannot be considered as the place where it was to be performed. They deny, however, the correctness of the legal proposition itself, and say it is immaterial whether the contract was made directly with the citizen of another State or not, and that it would make no difference even if Louisiana was to be considered as the place of performance; and they contend that, although this suit could not be entertained in the Federal Court for the reason that their title to the bill, as shown on its face, is traced through an immediate endorsee, residing in the same State with the maker, yet they are entitled, under the facts and law of the case, to maintain their action in the State tribunals. The first branch of the proposition which is denied by them, viz: that it is only in regard to contracts between citizens of different States that the validity of a discharge, under a State insolvent law, can be questioned, appears to us to be fully established in the case of *Ogden v. Saunders*. The case of *Braynard v. Marshall*, 8 Pickering, 194, in which it was held that if a note had either been given to a person belonging to

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another State, or had been endorsed to one before the discharge issued, the discharge would be no bar when the contract was sued on in the Courts of another State, from that in which the discharge is granted, is not applicable in principle to this case, and if it was, does not appear to be consistent with the doctrine laid down in the case of *Ogden v. Saunders*. Judge Story, who was one of the Judges who decided that case, has expressed his opinion to that effect. Story on Bills of Exchange, Secs. 166, 167, 168, 169. The second branch of the proposition, viz: that when even the contract is made directly with a citizen of another State, if it is stipulated to be performed within the State where the contract is made, and where the discharge is granted, it is not obnoxious to the constitutional prohibition against a State's passing laws impairing the obligation of contracts, is fairly deducible from the reasoning of Judge Story in the case of *Boyle v. Zacharie & Turner*, 4 Peters' R., 644. In that case *Zacharie & Turner* having obtained a judgment in the United States District Court at New Orleans against *Boyle*, who was a citizen of Maryland, for money advanced by them on account of *Boyle*, in New Orleans, and which *Boyle* assumed to pay them, proceeded to execute their judgment, and were enjoined by a bill in equity in the Circuit Court of Maryland, on the ground that *Boyle* had obtained a discharge under the Insolvent Act of Maryland. The Court considered the constitutionality of the State insolvent law as settled by the decision in the case of *Ogden* against *Saunders*, but it was contended that the contract upon which the judgment was founded was, in contemplation of law, a Maryland contract, and not a Louisiana contract, and was, therefore, discharged under the Insolvent Act of Maryland. Judge Story answered the objection by showing that the contract, on the part of *Boyle*, was to pay *Zacharie* and *Turner* for advances made by them for him in New Orleans, and that the payment, unless otherwise stipulated, would also be understood to be made in New Orleans. He therefore treated the contract as a Louisiana contract, and not as a Maryland contract. It therefore must have been considered by the Court that if Maryland had been the place of performance of the contract by the agreement of the parties, the contract would have been a Maryland contract, and discharged under the insolvent laws. And that view is entirely consonant with the reasoning of the Court by which, in the case of *Ogden v. Saunders*, they came to a conclusion in favor of the constitutionality of State bankrupt laws. In the present case, we are of opinion that the contract sued on was a Louisiana contract. It was executed in Louisiana; was made between citizens of Louisiana; and, not being otherwise stipulated, the payments would be understood as intended to be made in Louisiana. We have considered the case as if a discharge had been granted to the defendant by his creditors, because, although a discharge has not been granted, it has been contended that the stay of proceedings granted to the defendant, and the exemption of his future acquisitions to a certain extent from the pursuit of his creditors, which is the consequence flowing from the *cessio bonorum*, does itself materially impair the obligation, and that such is the effect practically, there can be little doubt. We are of opinion, however, that, according to the principles now settled by the highest authority, the validity and effect of our State insolvent laws, and of the judicial proceedings under them, which are pleaded by the defendant, cannot be denied in the Courts of our State under the circumstances of this case. It is not necessary to decide whether we could properly, under any circumstances, nullify the laws of the State so far as they only deny a remedy in our Courts to the citizens of other States, by placing

them in the same situation with our own citizens. We are not able to see how such laws could be considered as impairing the obligation of contracts entered into between our citizens and the citizens of other States, particularly as the Constitution of the United States has provided tribunals under its own authority for the enforcement of such contracts.

It is, therefore, ordered, adjudged and decreed that the judgment of the Court below be affirmed, with costs.

SLIDELL, C. J. I consider the general rule well settled that State insolvent laws, discharging the obligations of future contracts, are constitutional. It seems to me equally clear that the defendant in this case is protected by our State law. A resident and citizen of Louisiana, he accepted at New Orleans a bill drawn here by a citizen of this State, in favor of and endorsed by a citizen of this State, and negotiated here to a citizen of this State, who afterwards transferred it to the plaintiffs, residents of Kentucky. Not only was the acceptance made here, but the reasonable expectation of all parties must have been that it was to be paid here, where the acceptor lived, and was established as a merchant. I cannot understand by what right this transferee of a Louisiana creditor can ask a Court of Louisiana to disregard its own insolvent laws, and violate a *cessio bonorum*, and a stay of proceeding regularly adjudged in a Court of Louisiana. Such a doctrine, it seems to me, would involve principles subversive of State sovereignty, and for which I find no sufficient warrant in the Constitution of the United States.

I have, therefore, no hesitation in concurring in the affirmance of the decree.

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8	341
45	1066
8	341
48	492
48	1219
48	1222

**POLICE JURY—RIGHT BANK—FOR THE USE OF THE NEW ORLEANS,
OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY v. SUCCESS-
SION OF JOHN McDONOGH.**

The Act of March 12, 1852, "providing for the subscription by the parishes and municipal corporations of this State to the stock of corporations undertaking works of internal improvements, and for the payment and disposal of the stock so subscribed"—is constitutional.

The restrictions imposed by Articles 108 and 109 of the Constitution of 1852, upon the aid which the State may grant to corporations for internal improvements, is no limitation upon the aid which the Legislature may authorize the Police Juries, &c., to grant.

The provision in the Act of 1852, requiring that no ordinances imposing a tax for works of internal improvements shall be valid, unless it has been ratified by a majority of the voters on whose property it is proposed the tax shall be levied—is not unconstitutional, nor at variance with the spirit of representative government.

The burden imposed under the Act of 1852 is a tax, with regard to which each citizen has not a right to decide, authoritatively, for himself alone, whether the tax is for a useful purpose, and will redound to his individual advantage. If each citizen can be permitted to complain that his tax has been increased without his individual assent, and for a purpose of which he, individually, disapproves, all government would be at an end. Of the public good which warrants a tax, the Legislature, for general purposes, and the duly constituted local authorities, acting under the express will of the Legislature for local purposes, are to judge.

The power of taxation, and that of taking private property for public use, are distinct things. In the latter case, previous compensation must be made. In the former, though in taking a man's money by taxation you do take his property, the compensation is considered as simultaneously given in the benefit, which, as a citizen, he enjoys in common with his fellow-citizens, in the public welfare and the public prosperity, to the advancement of which the money is to be applied.

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The provision that the contribution levied shall entitle the contributor to stock in the corporation, cannot be regarded as a grievance, and in no respects changes its character as a tax. The Supreme Court will exercise a discretion in entertaining appeals from *pro forma* judgments. The review of a *pro forma* judgment is not the exercise of original jurisdiction. And there can be no good objection to it in a case like this, where no question of fact is involved, and where the judgment was entered up in good faith, in order to speed the trial of a cause of great public importance.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Cohen and R. Hunt*, for plaintiff and appellant. *Grioot and L. Pierce*, for defendant. *Durant & Horner*, also for defendant, filed the following brief:

The plaintiffs claim \$417, which they allege to be due to them for the amount of a tax assessed on the defendant's real estate lying within their jurisdiction.

This tax was assessed by the plaintiffs, in pursuance of an act of 12th March, 1852, entitled "An act providing for subscriptions, by the parishes and municipal corporations of this State, to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of the stock so subscribed."

On an examination of the provisions of this act, it will be found to be repugnant to various articles of the Constitution of 1845, as well as of that which now exists, and to be totally in derogation of common right.

Section first of said act (see Acts, page 128) provides that it shall be lawful for police juries and municipal corporations of this State to subscribe to the stock of corporations undertaking works of internal improvement under the laws of this State, on complying with the provisions of this act."

Section second specifies the form in which the subscription ordinance of the Police Jury shall be framed.

The Legislature was without power to confer such an authority as this. Waiving, for a moment, the question of the power of the Legislature itself, under our Constitution, to embark in a system of internal improvement to the *unlimited* extent proposed in this section to be allowed to Police Juries, but admitting, for the sake of argument, that the power exists in them, i. e., the Legislature, let us consider whether that power could be delegated, without limit or restriction, to the Police Juries of the State.

The police Juries are political corporations.

Vide Police Jury v. McDonogh, 7 Martin, 17.

Same v. Fluker, 1 Rob., 389.

McGuire v. Bry, 3 Rob. 196.

The laws establishing them are ordinary acts of legislation, and are to be construed and applied in all cases like other laws.

Vide Reynolds v. Baldwin, 1 An., 162.

They are established for public purposes alone, and to administer a part of the sovereign power of the State over a small portion of its territory.

Vide Police Jury v. Shreveport, 5 An., 665.

The part of the sovereign power which this Police Jury administers is not defined in the act of 12th March, 1852, now in question, (*vide* Acts, page 128 and 129,) and must be looked for elsewhere. It will be found in the act of 28th March, 1840, entitled "An act to create a separate Police Jury in and for that portion of the parish of Orleans situated on the right bank of the river Mississippi."

Vide Bullard & Curry's Digest, page 657.

It has, by section 3d, page 658, Bullard & Curry's Digest, the same powers and subject to the same duties as the Police Juries of the other parishes of the State.

The powers and duties of Police Juries in general are defined in the act of 25th March, 1813, and the acts supplementary thereto.

Vide Bullard & Curry's Digest, pp. 639 *et seq.*

These powers and duties are purely those of administration of matters connected with the police and good order of the neighborhood; and hence the Police Jury is only authorized to sell and buy movable or immovable property, so far as either act may be necessary to the proper carrying out of their expressly delegated powers, which only, as a matter of course, they possess; being created by the Legislature alone, and having no power but such as is expressly conferred.

Vide Police Jury v. Shreveport, 5th An., 665.

What, then, is the true extent of the power conferred by the first section of the act of 12th March, 1852, on the Police Jury of this right bank? Nothing more than to subscribe for stock in such works of internal improvement as are necessary to them in performing the duties imposed upon, or the powers delegated to them. For unless this be the true extent and limit of the power conferred, then the Police Juries are absolutely without restriction in this regard; they may subscribe for stock, and so contract debts without limitation as to amount, and embark in works of internal improvement not only beyond the limits of their respective parishes, but even beyond the limits of the State itself. Such undertakings and enterprises as these were never contemplated by the Legislature when the Police Jury of the right bank was constituted, nor could they be allowed to raise money by taxation for any such purpose.

Vide Municipality No. 1 v. McDonogh, 2 R. 244.

Anthony v. Adams, 1 Metcalf, 284, 286.

Parsons v. Goshen, 11 Pick., 896.

Stetson v. Kempton, 13 Mass., 272.

Norton v. Mansfield, 16 do., 48.

The tax attempted to be enforced here is for a subscription to a railroad not necessary to any of the purposes for which Police Juries are created, and extending, or designed to extend, to the western border of Louisiana, and finally to the Pacific.

Vide act of 22d April, 1853, published in the Louisiana Courier of Tuesday, 17th May, 1853.

But a very insignificant portion of the road is intended to be within the territorial limits of the Police Jury of the right bank.

This law, then, of March 12th, 1852, under the interpretation put upon it by the plaintiff, empowers the Police Jury to subscribe for an unlimited amount of stock, in a road not necessary to their powers and duties of administration and police, and extending far beyond the limits of their parish. Such unlimited power cannot be conferred under a government where individual right is respected; it is essentially arbitrary and without restraint, and spurns all those limits fixed by the principles on which our institutions are founded, and which our Constitution recognizes as sacred; it is such a power which this Court has emphatically denied to exist in any of the departments of the State government, general or local.

Vide Second Municipality v. Duncan, 2d An., 185.

The Legislature has attempted to confer no such power as is contended for by the plaintiff. If the Legislature did make the attempt, the act is void, as being contrary to the Constitution.

The plaintiffs declare in their brief, that "The State Legislature has all the legislative power not inhibited by the Constitution of the United States, or by the State Constitution, or the principles on which our institutions are founded."

And this Court has said "that the State Legislature may do whatever is not prohibited by the (State) Constitution."

Vide Bozant v. Campbell, 9 Rob., 413.

The Court goes much further than the counsel, though the latter is certainly much nearer the truth.

There are many powers of sovereignty and government not expressly mentioned in the Constitution of the State, which, nevertheless, the Legislature cannot exercise: such as the powers surrendered to the General Government by the Federal compact; those enumerated in the Convention with the French Republic, by which Louisiana was ceded, and those enumerated in the Ordinance of Congress of the Old Confederation of 13th July, 1787.

Vide Wardens of Church of St. Louis v. Blanc, 8 Rob., 52.

He who should suppose, then, that the State Legislature is possessed of every power which the State Constitution does not expressly forbid it to exercise, would be very widely mistaken.

The Police Jury system existed in this State before the Constitutions of 1845 and 1852; the powers and duties of Police Juries were well defined; and those Constitutions were framed with reference to Police Juries; their existence is recognized in them.

The 7th Article in each Constitution declares, that "The Legislature may delegate the power of establishing election precincts to the parochial or municipal authorities." This may be construed very properly to mean that the Legis-

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lature *may not* delegate to the parochial authorities, other powers usually exercised by the Legislature only.

It must indeed be admitted as certain, that the Legislature cannot delegate to the parochial authorities a power which it does not itself possess.

The Constitution of 1845, Article 116, and that of 1852, Article 118, declare that "No lottery shall be authorized by the State" (i. e., the Legislature;) of course, then, a law authorizing Police Juries to carry on lotteries would be null and void. Many such examples might be given, but they are too plain for controversy.

Nor can the State Legislature effect indirectly, by delegation of authority to Police Juries, purposes which they are forbidden to pursue directly and by themselves.

The Legislature could not, by any act, transfer the whole legislative power of the State to the Police Juries (see plaintiff's brief, top of page 4, where this is admitted;) but under the mandate of the sovereign people, must carry on the legislation of the State itself; for the Constitution declares that the legislative power of the people is vested in two distinct branches, the House of Representatives and the Senate, and the power of legislation exists no where else.

The Constitution of 1845, Article 32, and that of 1852, Article 30, declares that "all bills for raising revenue shall originate in the House of Representatives." An act delegating to the parochial authorities the power to raise, by taxation, such sums as might be necessary to defray the expenses of the executive department, or any other State expenses, would be in conflict with these Articles. The Constitution intended to confine the raising of money from the people for general purposes to a particular body; and that body cannot evade the performance of the duty, and shift the responsibility of it upon others.

The 105th Article of the Constitution of 1852 provides, that "vested rights shall not be divested unless for purposes of public utility, and for adequate compensation previously made." The Legislature cannot evade this restriction, and delegate to the parochial authorities the right of taking private property for public use, without paying for it.

The Article 108 of the Constitution of 1852, prohibits the State, i. e., the Legislature, from subscribing for stock in a bank; now, the Legislature is elected by the people of all the parishes, and represents them; and the people of all the parishes are respectively the Police Juries. If all the Police Juries, by virtue of a general act of the Legislature authorizing and empowering them thereunto, should subscribe for bank stock, how would this differ, so far as respects results, so far as the wants, the wishes, the obligations of the people are concerned, from a subscription by the Legislature?

Further, and to come to the very case involved, in this very suit, what is the true meaning of all these Articles in the Constitution restricting the debts of the State? And, particularly, what is the meaning of Article 109 of the Constitution of 1852? Is it not that the people shall be protected from the imposition of the burthen of taxation for purposes of internal improvement, unless certain forms and conditions are complied with, and unless certain safeguards are provided for their protection? Is it possible, then, that the Legislature can, by a general law, produce or cause to be produced by others, the same effect of burthening the people with taxation, and at the same time, break through the conditions and overleap the barriers reared by the Constitution to protect the property of the citizens.

This Article 109 of the Constitution of 1852, limits the power of the Legislature, i. e. of the State, to a subscription within certain amounts, for the stocks of internal improvement companies, carrying on works "wholly or partially within the State." The limitation is salutary, and the reason of it manifest; it was intended to protect the citizens from being taxed for any work of internal improvement out of the State, and to prevent them from being taxed for any work within the State beyond a certain amount of money: there is a limitation of locality and a restriction of the sum to be subscribed. These limitations and restrictions are imposed for the benefit of the whole people of the State; they are the mandate of the sovereign to his agents, which the latter may not transgress; they must, on all sound rules of interpretation, be construed strictly in favor of the people, and against the Legislature.

But these restrictions are all evaded by the Act of 1852, by which the Legislature attempts to confer on Police Juries and political corporations, the power

to tax the people for works of internal improvement, whether within or without the State, and for an amount of money altogether unlimited.

Here is a clear evasion of the restrictions of the Constitution; the Legislature has no such power as to place a burthen upon the people of more than eight millions of dollars for these works, nor to carry on or aid in carrying them on, out of the State; the Legislature cannot then transfer such a power to the Police Juries or other political corporations, its subordinates.

The Acts of 12th March, 1852, on which plaintiffs rely, in its third section, provides "that no ordinance passed under its provisions shall be valid or take effect until it shall have been approved and ratified by a majority of the voters on whose property it is proposed to be levied."

Vide Acts 1852, p. 128.

And the same section provides that a majority of the said voters may reject the ordinance.

Acts 1852, p. 129.

If it should be deemed that the Legislature of our State possesses the Constitutional right to delegate such powers as are here claimed for the Police Jury; and if it should be further considered that the Police Jury may lawfully embark in enterprises of this nature; some further questions then remain to be settled, as to whether the mode in which the ordinance of the Police Jury is to be ratified, approved or rejected, be in accordance with the principles and spirit of the State Constitution and the theory of our institutions, or not.

The powers of the government of the State of Louisiana are distributed into three departments, (*vide* Constitution, Article 1st,) which is to be taken as meaning that the whole sovereign power of the people, so far as they have not delegated certain portions of the same to the General Government, is to be exercised by three distinct departments or bodies. And this Article further says, that those powers which are legislative are confided to one department called the Legislature, which means that the whole power of legislating in Louisiana, all sovereign powers which are not of a judicial or executive character, are vested in the Legislature, and in that department alone; no other department, nor any individual belonging to any other department, being allowed to exercise any legislative authority, do any legislative act, or perform any legislative function whatever.

Constitution, Art. 2.

An act of the legislative department, within its proper sphere, is binding on every individual of the State, when approved by the Executive, or adopted by the requisite majority, after his refusal to approve, and no further action of any kind is necessary. Such an act is unconditional and absolute as to its binding force.

Says the 8d Article of the Constitution, "the legislative power (i. e., the whole legislative power) of the State shall be vested in two distinct branches, the one to be styled the House of Representatives, the other the Senate."

The whole legislative power being vested in these two branches, they alone can legislate; no other department of government can; nor can all the departments combined; nor can a portion of the people, nor the whole people, for an attempt on the part of either of these to do so, would be an attempt to act in that in which the Legislature is exclusive; the sovereign power of legislation cannot, from its very nature, be vested in two distinct quarters at the same time, for the case of two sovereigns, operating at the same time and on the same subject, is an impossibility; and to say they can do so, is to employ a contradiction of terms.

An act, though in the shape of legislation, whose operation and effect are suspended until a certain power approves and ratifies it, is no law until the approval or ratification takes place. In such a case, the legislative act is really the ratification. Now, the Legislature of Louisiana is the sovereign power of the government in legislating, as the Judiciary is in judging. The judicial courts could not say, "We decide this case in favor of plaintiff, or in favor of defendant, but the judgment shall have no force or effect until submitted to a vote of the people, or to that of a fraction of the people, i. e., the owners of real estate, for instance, and ratified and approved by the majority of those who choose to come forward and vote." Apply the same illustration to the Executive, and suppose that the Governor, when an act of the Legislature is submitted to him, under the provisions of Article 53d of the Constitution, should

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approve and sign the same, but with the condition that it shall be submitted to the people, or a part of them, for ratification; his conduct would appear absurd, and as evincing a desire to avoid the responsibility of his official position; it would, in short, be an unconstitutional attempt, and render his approval of the act a nullity; for his whole constitutional power, as well as his duty, is to approve or to return the bills sent to him; he cannot do less—he cannot do more. Yet, as an independent department of the government, as bearing the delegation, to the exclusion of all others, from the sovereign people, of the power to approve and execute the law, he stands on the same footing precisely with regard to an appeal to the people, as the Legislature, and both the Executive and the Judiciary Department have this right, if the Legislative Department enjoys it; and this conclusion, irresistible from the premises, would throw society into confusion, and set the Constitution at defiance, by breaking through its most positive and clearly defined injunctions.

When the Legislature, i. e., the Senate and House of Representatives, have passed an act, and it has been approved by the Governor, it is complete: no power, but that of the Judiciary, can defeat it, and that only in specified cases; whether the people approve or disapprove, is immaterial—it is the law. The people cannot vote upon it—that would be legislating; they have reserved no legislative power; they have transferred it entire to the Legislature: that body must execute its trust: it must bear the whole weight of the responsibility of its acts. The people, as a political body, have but one way to act upon laws; they may choose a Legislature which will repeal or modify the act; beyond this the people can do nothing. The Constitution permits nothing else to be done; and the Constitution is just as binding upon the whole mass of the people in their aggregate capacity, as upon a single individual of their number. This obligation of all constitutional provisions upon the mass is essential to preserve the rights of individuals and of the minority, ever a jealous object of care in a republican government, but which would be the sport of the will of the majority, unless the view now taken be correct.

In short, there is but one, and only one case in which a law can be submitted to the popular vote, and that is a law amendatory of the Constitution.

Vide Constitution, Art. 141.

The course of reasoning here adopted is as applicable to the case of an Act of a Police Jury, as an Act of the Legislature. The body called the Police Jury is composed of members elected by the subdivisions or parochial wards: it is the Legislature of the Parish. All matters of legislation, fit and proper to be decided by the government of a parish, and coming with propriety under its jurisdiction, are to be passed upon by the Police Jury, and by it alone. The Police Jury represent, not only the owners of real estate within its territorial jurisdiction, but they are political agents, for local purposes, of the whole body of the inhabitants of the parish.

Act 25th March, 1818, section 2, Bullard & Curry's Digest, p. 639.

Act 9th March, 1846, p. 5.

These inhabitants carry on their local legislation, not by a popular assembly, or by their own immediate deliberation and decision, but by their agents and representatives, the Police Jury, who "are empowered to make all such regulations as they may deem expedient," for certain local purposes specially enumerated.

Act of 25th March, 1818, sec. 5, Bullard & Curry's Digest, p. 640.

Act of 9th April, 1847, pp. 81, 82.

Now, the very constitution of the Police Jury likens it, in every respect, to the Legislature: the members represent the people; they are empowered for certain purposes to pass laws: this right must exist without control: the ordinance they pass must either be valid and binding on the representative by the will of the legislative body, or it is altogether null. But the third section of the Act of 1852 provides that the Police Jury may pass an ordinance, and the owners of real estate approve or reject it: and without the approval of the real estate owners, the ordinance is null. We have already shown that under our constitution neither the people, nor any portion of them, can be called in to act in this way. Ratification or approval of an ordinance is legislation; and no power of legislation exists in the people; the whole legislative power is vested, by the constitution, in the legislature; and if they, the legislature, can, for definite and specific purposes, delegate a portion of that legislative power to

political corporations, which were in existence when the constitution was adopted, and whose existence and usefulness is recognized by that instrument, yet the power so delegated must be employed in accordance with established usage and the analogies of the case. The legislature of the State cannot constitutionally confer on the people, or the real estate owners of any parish, the capacity to legislate. Though it may say, certain legislative powers of local police requirement we will not exercise, but will leave them to be exercised by a subordinate and co-operating legislature, the Police Jury; yet they cannot make the exercise of the power of that Police Jury to depend on the vote of a portion of the inhabitants. Under our system of government, which is a *representative* democracy, the people do not legislate, do not judge, do not execute, whether for general or special purposes; they elect certain citizens to do all these things; none others can do them: the people, in their original capacity, can do none of them. To attempt to call the original mass of the people into action for these purposes, is to pervert the whole theory and essence of our institutions: and if carried out to its consequences, will necessarily destroy them.

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Now, the Court will observe that the Act by which this tax is claimed from us derives its whole vigor from the vote of the majority of the real estate holders of the right bank; it is their exercise of a power which they did not possess, and which the legislature could not constitutionally confer upon them: hence, for this essential nullity, the whole law is void and of no effect. "For under our system, statutes and ordinances are entire; one portion cannot be enforced alone, and the other parts declared null. If some of the provisions are illegal, the whole is null."

Vide The Second Municipality v. Morgan, 1 Annual, 111.

The whole of this Act is but an incarnation of legislative mendacity; to enforce it, or to allow the plaintiffs to recover, would be to give effect to an untruth.

It purports to be an Act to authorize municipal corporations to subscribe to the stock of companies prosecuting works of internal improvement. It is no such thing. It never was intended that the municipal corporations should take or own any such stock, nor can they do so by the terms of the Act.

The 4th section of the Act provides that the stock subscribed shall *not* belong to the municipal corporation subscribing for it, nor even be administered by them—vide Acts, page 129; but the stock shall belong to those who pay the taxes.

The corporation, plaintiff herein, is an intellectual being, different and distinct from all the persons who compose it. La. Code, art. 426.

Hence, the plaintiff, the Police Jury, though it might subscribe for stock for itself, could not subscribe for stock for any one of the inhabitants, nor for all the inhabitants in their individual capacities: yet this is what the law attempts to do, or authorizes the Police Jury to do. Such an attempt must be treated as a nullity. The Police Jury subscribes for what does not belong to it, (Louisiana Code, 427,) and controls the mode of payment for the property, when others have the title and administration.

The intent and effect of such a law is plain; it is to force individuals to take and pay for stock in a railroad company, whether they wish it or not; whether they think the enterprise likely to be beneficial or not: in short, whether they approve it or disapprove it. This is mere spoliation. The genius of our people and our institutions require that each man should be left free to invest his capital in such mode as to him shall seem most beneficial; and to control his judgment by the action of a majority, even were that majority all the members of the community except himself, would be an act of tyranny incompatible with our system of government.

The act of the majority is in no case considered the act of the whole, unless that majority is of the members of a regularly organized body, established, constructed, recognized by law; such as a sovereign State, a political or private corporation. In these, the majority of the members bind the minority, when the question is taken upon one of the subjects or interests committed to the whole body (Louisiana Code, article 435). But in the case before the Court, to whom was the question of the ratification of the ordinance subscribing stock in the Opelousas Railroad submitted? and what was the real question submitted to them?

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The question was submitted to the vote of the owners of real estate in the part of the parish of Orleans on the right bank of the river.

And the real question was—shall we, i. e., each of us, take stock in proportion to the value of our real estate?

And it is contended that, as more than half of the owners of real estate said, we will take stock, the others are bound to take it too. Now, such a result can only follow if the owners of real estate on the right bank are a corporation, and were voting on a question within their corporate powers. But they are not a corporation. It is the whole of the inhabitants there, and they alone, who are incorporated and represented by the Police Jury; the owners of real estate have no corporate existence: they can neither sue nor be sued as a body. They enjoy no public character: in short, they have no corporate character or powers. Upon what ground, then, of law, of reason, or of common justice is it that ninety-nine of them even can say to the hundredth, you must do as we do. This is a merely tyrannical perversion of the law that the majority governs: in which corporate rapacity, speculation and cupidity apply a rule, applicable only to political action, to the management of private interests and affairs, impudently and audaciously asserting that a stock subscription is a tax, and a mere private undertaking may defray its expenses by spoliating those who desire no connection with it.

The plaintiffs say in their brief, page 4, "that all property within the State is held subject to the power of constitutional taxation, by the legislature, for general purposes, and all property within the several local divisions of the State is held subject to such taxation, for local purposes, as may be lawfully imposed upon the local property by the local authorities."

They rely upon these well recognised and undeniable principles to justify the present demand for payment of what they style a tax for local purposes.

The application of the principles, here announced, to the present case involves, we submit, two important errors.

In the first place, the enterprise of building a railroad from the parish of Orleans to the Pacific, or even to the State line, can, in no sense of the terms, be called a local purpose: it may be designed to benefit the locality where the road commences, but to call it a local improvement, on that ground, is a confusion of terms, which would make every undertaking, however general, of only local importance, and destroy the distinction in idea between what is general and what special.

In the second place, the contribution which the defendants are called upon to pay is not a tax.

A tax is a burthen, charge, or imposition, set on persons or property for public uses; exactions to fill the coffers for the payment of the debt and the promotion of the general welfare of the country.

Second Municipality v. Morgan, 1 Ann. 115.

The exaction now made upon the defendants cannot be brought within this definition. It is not laid for "public uses," but to aid an incorporated railroad company, composed of citizens who are combined together for the sake of individual gain, and who, without that incentive, would not combine; their uses are no more "public," in the sense of the word as it is employed in the above legal definition, than any other commercial speculation. A public use is one in which the whole nation or sovereignty is interested (Louisiana Code, article 444); or the meaning may even be narrowed down, in the present instance, to a purpose in which the whole of the inhabitants of the parish is interested, but still it would be unsuitable, for not one cent of the profits of the railroad company will go into the coffers of the Police Jury; as the stock to be given in exchange for the pecuniary exaction, is not to belong to the local government, nor even to be administered by it; and hence the purpose and object of the contribution is not public, but private, in the strict sense of the term.

A company, chartered to construct and carry on a railroad, is a private corporation. Louisiana Code, article 420.

The plaintiffs have also adopted another idea, which may be ranked among those popular delusions, not the smallest of which was exemplified in an ingenious attempt of the eminent financiers, who once conducted the business of the Municipality No. Two, to persuade property holders that taxation was a blessing to them, and that by having a portion of their property taken away from them, they were really to be made richer. This scheme, however, was liable to

a serious objection in the minds of honest men. It was thought to be but a genteel mode of appropriating property without the consent of the owner, and as such, declared by the Supreme Court of this State, to be illegal and worthy of utter reprobation.

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Vide Municipality No. Two v. Morgan, 1st Annual, 111.

The present notion seems to be, that it is only necessary to call an enterprise a public one, and that every individual can then be compelled by a vote of the majority, to invest his means in it. What would be thought if a question of some colossal speculation in cotton, or other produce, were ordered by the legislature to be submitted to the vote of the merchants of New Orleans, and the minority forced to embark in it, though unwillingly? There is no doubt that such a law would be denounced as a gross violation of common right.

In the case before us, the projected improvement, or railroad, may be termed public, and so it is as far as it is open, notorious, seen by all, but not in the sense of belonging to the sovereign or nation, as the word is used in our Code, and which is its legal, as distinguished from its ordinary meaning.

Having pronounced it a public work, the plaintiffs then declare that, even if the contribution voted in its favor is not strictly speaking a tax, yet that the laws of society require that private property should be yielded for the public good, when the public necessities require it.

The sovereign power is indeed vested with the right of eminent domain.

Vide Vattel's Law of Nations, book 1, chapter 20, and this principle is incorporated in the Louisiana Code, articles 489 and 2804.

And it may further be admitted that the legislature may delegate this power for specific purposes, to political or private corporations; but it cannot be successfully maintained that the legislature can delegate this important power, freed and unshackled from the essential condition imposed upon its exercise in all civilized States, to wit: that of paying for the private property taken, and of giving "an equitable and previous indemnity."

Vide Vattel and the Code, as cited.

But in the case before the Court, no indemnity is given for the money attempted to be taken from the pocket of the defendant. What indemnity, indeed, could there be but an equal amount of money? The plaintiffs say, in pursuance of the Act of 1852, we give you stock in our company to the same nominal amount, and this is your indemnity; but such a reply is a mockery.

Vide Baker v. Boston, 12 Pickering, 184.

Taylor v. Porter, 4 Hill, 140.

The compensation or indemnity does not consist in any actual or expected improvement, or profit, to the individual deprived of his property, but can only be made in money.

The People v. The Mayor of Brooklyn, 6 Barb., Supreme Court Rep., 209.

M. M. Cohen, for plaintiffs and appellants.*

Petitioners claim the amount of the Parish tax of one per cent., for the year 1853, levied by them on the landed estate of defendant, in the parish of Orleans, within their jurisdiction.

This tax was levied by virtue of an Act of the Legislature of Louisiana, approved 12th March, 1852, and No. 175, under which law appellants, on the 16th July, 1852, subscribed to the stock of said Railroad Company, and also by virtue of the ordinance passed by petitioners, and approved December 6, 1852, by a majority of the voters, at an election held in conformity with said Act, No. 175, Session 1852.

Defendant resists said claim, on the ground that the law of the Legislature of 1852, and the ordinance under which these proceedings were had, are illegal and contrary to the constitution of the State, and of the United States.

It is obvious that the only issue made by the pleadings is a legal one, a constitutional question.

Appellants aver that the Act of the Legislature, and the ordinance passed in pursuance thereof, are legal and constitutional.

The true theory of our government we hold to be this, that while Congress possesses no powers except such as are conferred by the constitution of the United States, the State Legislature has all legislative power not inhibited by

* The brief of *Mr. Cohen*, properly, should precede the brief *Mr. Durant*.

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that instrument, or by the State constitution, or the principles on which our institutions are founded.

The only clause of the latter constitution which it has ever been contended applies to the Act of 1852, is article 123, which requires that "taxation shall be equal and uniform throughout the State."

These words are identical with those contained in Article 127 of the constitution of 1845, under which our Supreme Court decided that a tax imposed by an ordinance on certain enumerated trades and professions, cannot be considered illegal or unconstitutional, because other trades and professions are not taxed. (*Lafayette v. Cumming*, 8 Ann. 678; *Duncan v. Municipality No. 2*, 2 Ann. 182.)

A mere perusal of Section 1 and 2 of the Act of 1852, No. 175, shows that the tax is equal and uniform throughout the State.

The Supreme Court of Kentucky, in the case of the *City of Louisville v. McQuillan's Heirs*, 9 Dana, 516, says, "an exact equalization of the burden of taxation is unattainable and utopian."

The same Court in the case of *Cheaney v. Hooser*, 9 Ben. Monroe, 380, thus meets another objection, which we may anticipate will be raised in our case, viz: as to the power of the legislature to delegate the power of legislation and taxation.

"*Cheaney v. Hooser*. The legislature have the constitutional power to confer taxing power upon local corporations, for their government and security."

The objection, that the legislature cannot constitutionally delegate to a local corporation the power of local legislation and taxation for local purposes, is founded upon a misconception of the nature and extent of legislative power granted to the legislative department, and is disproved by the practice of constitutional governments everywhere. It is the legislative power of the commonwealth excluding the power over the constitution itself, that is vested in the legislature, subject only to the restrictions above referred to. That power undoubtedly includes the power of erecting local corporations, to be invested with subordinate powers, essential to the local convenience, and to the enforcement of good order and peace within the corporate territory. A special local taxation, as already intimated, follows justly and naturally, as the correlative of the separate association of the incorporated community for purposes essentially peculiar to itself, and in which the commonwealth at large has only such partial and indirect interest as the whole community is supposed to have in the prosperity and good government of every part. While, therefore, the legislature, as the depository of the general legislative power, may and should, in the erection and regulation of these subordinate governments, which are but instruments for conveniently carrying out the objects of the State government, confer only such powers as are necessary for the local convenience, and limit the powers of taxation so as to prevent unnecessary and oppressive burthens, it seems more convenient and appropriate, and more accordant with the spirit of our institutions and polity, that the power of local regulation and of taxation for local purposes, should be exercised by the local authorities, than by the central government. And although it is true that the legislature cannot constitutionally delegate the general powers of legislation, or any portion of them, yet the power of erecting municipal corporations with powers of local regulations and taxation, being itself a part of the general legislative power, may be exercised at the discretion of the legislature, without a violation of the constitution or principles of the government. Such acts of legislation have occurred in this State, in instances almost without number, and their validity has been maintained in this Court in many cases, either by tacit recognition or express decision. (*Williamson v. Commonwealth*, 4 B. Monroe, 150; *Keasey v. City of Louisville*, 4 Dana, 525; *Lexington v. McQuillan's Heirs*, 9 Dana; *Tesk v. Commonwealth*, 4 Dana, 525; *Louisville v. Hyatt*, 2 B. Monroe, 177; *Same v. Same*, 5 B. Monroe, 199.)

The principle, that municipal councils and police juries should be empowered to levy a tax on real estate, providing that the ordinance passed should not be binding until approved by a majority of the voters, at a special election called for that purpose, has been resorted to in Ohio, Kentucky, Tennessee, Mississippi, Mobile, &c., with more or less modification. The legality and constitutionality of it were sustained in an elaborate decision in the Supreme Court of Kentucky. *Talbot v. Dent*, 9 B. Monroe's Rep., p. 586, 588. 1849. The case decides:

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"1. The Legislature have constitutional authority to grant to town corporations power to tax the property of towns or cities for the construction of works of internal improvement, for facility of access to, and transportation to and from the town or city. 8 Leigh's Rep 120. 15 Con. Rep. 475. Ten. Sup. Court. A railroad to a city is such a work.

"2. Taxation by a local corporation for a local purpose, and tending to promote the local prosperity, is within the scope of the corporate power of city corporations, when sanctioned by the legislative authority, though not consented to by each individual to be affected thereby; the will of a *majority* is to govern, when it is referred to the decision of those to be affected."

Chief Justice Marshall, in delivering the opinion of the Court, said :

"We pass, then, to the fundamental question, whether the Legislature could constitutionally authorize the public authorities of Louisville, with the consent of a majority of the voters of the city, to subscribe for stock in the Louisville and Frankfort Railroad Company, and to pay for it by increased taxation upon the citizens. And as the right of the Legislature to delegate the power of taxation for local purposes, to the regularly constituted local authorities, is too well established, both by Legislative precedents, and by judicial decisions, to be now denied, and is, in fact, conceded on all sides in the present case, the question stated resolves itself into the inquiry, first: Whether, in the present instance, the power is delegated and exercised for a purpose properly local, or within the legitimate objects of the local corporation? and, second: Whether, if it be so, any invasion of the constitutional rights of individuals is involved, either in the circumstances under which the power was delegated, or in those which have attended its exercise?

"Upon the first question, we do not deem it necessary to make any labored argument or discussion. Substantially, the same question has been discussed and decided by the Supreme Courts in the States of Virginia, Connecticut and Tennessee; and each of these Courts has affirmed the power of the Legislature, in their respective States, to authorize a subscription of stock involving the power of taxation for its payment, by the corporate authorities of a city, under special legislative sanction, for the construction of a work of internal improvement, by which the facility of access and of transportation to and from the city is to be increased. *Goddin v. Crump, &c.*, 8 Leigh's Reports, 120. *The city of Bridgeport v. the Housatonic Railroad Company*, 15 Connecticut Reports, 475, and *Nichol, &c. v. the Corporation of Nashville*, in the Supreme Court of Tennessee, 1849, (pamphlet report.)

The following authorities will be relied on, to show:

1st. That the Act of 1852 is a correct and constitutional exercise of power by the Legislature.

2d. That the ordinance of the Police Jury does not take from the defendant private property without compensation:

1st. *Goddin v. Crump*, 8 Leigh, 120.

Flack et al. v. Lexington and Mayor, R. R. Company.

American Railroad Journal, 2d quarto, 9.

Nichol et al. v. Mayor and Aldermen of Nashville, 9 Hump. 252.

City of Bridgeport v. Housatonic R. R. Co., 15 Conn., 475.

James River Co. v. Lumer, 9 Leigh, 825.

Thomas v. Leland, 24 Wend. 65.

Harrison v. Holland, 3 Grattan, 247.

The Inhabitants of Norwich v. the County Commissioners of Hampshire, 13 Pick. 60.

2d. *Angell on Watercourses*, 40,

Thompson v. G. G. R. R. & B. Co., 3 How. 249.

Kent's Com., vol. 3., p. 289.

11, *B. Monroe*, 142.

9, *B. Monroe*, 526.

SLIDELL, C. J. On the 12th March, 1852, an Act was passed by the legislature of this State, entitled, An act providing for the subscription by the parishes and municipal corporations of the State, to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of the stock so subscribed. It is in these words:

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"Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That it shall be lawful for the Police Juries and Municipal Corporations of this State to subscribe to the stock of corporations undertaking works of internal improvements, under the laws of the State, on complying with the provisions of this Act.

Section 2. And be it further enacted, &c., That all ordinances passed for such subscriptions, shall contain the following provisions, to wit: 1o. A statement of the number and amount of the shares proposed to be subscribed. 2o. The levy of a tax on the landed estate, situated in the parish or municipal corporation, sufficient to pay the amount of said subscription, and specifying the rate of the taxation and the period or periods when it shall be payable.

Section 3. Be it further enacted, &c., That no ordinance passed under the provisions of this Act shall be valid, or take effect, until it shall have been approved and ratified by a majority of the voters on whose property the tax is proposed to be levied, at an election to be held specially for that purpose, by order of the Police Jury, or municipal corporation, passing the ordinance, and said Police Jury, or municipal corporation, shall prescribe the manner of holding such election, and shall cause to be furnished to the commissioners of the same, a properly certified list of the authorized voters, and such election shall be preceded by a notice of thirty days, published in one or more newspapers in the parish or municipal corporation where such election shall be held; provided however, that if such ordinance shall be rejected by the majority of the voters, it shall be lawful, at any subsequent period, again to take the sense of the voters, in the same manner as at the first election, and at intervals of not less than six months.

Section 4. Be it further enacted, &c.; That if any subscription be made under the terms of this Act, the stock, so subscribed, shall not belong to, nor be administered by the parish or municipal corporation by which the subscription shall be made, but said stock shall belong to the taxpayers who shall have paid therefor; and the tax receipt of each taxpayer shall entitle him to a certificate, transferable by delivery from the corporation, to which subscription has been made, for an amount equal to the amount of his tax paid; provided, however, that said Police Jury, or municipal corporation, shall be empowered to require such bond and security, and in such sums, from the sheriffs or collectors of said tax, as they may deem necessary."

The present suit is brought by the Police Jury of the Right Bank to collect the amount of the tax assessed on lands within its jurisdiction, to meet its subscription to the stock of the New Orleans, Opelousas and Great Western Railroad Company, under an ordinance, alleged in the petition to have been approved and ratified pursuant to the statute, after an election, and other proceedings in conformity therewith.

The answer of the defendants raised the question of the constitutionality of the statute and ordinance. The parties being desirous to speed the final decision of the cause, signed an agreement that judgment *pro forma* should be entered in favor of the defendants, reserving to the plaintiffs their right of appeal. Under this agreement the cause was submitted in the Court below, and the Court considering the agreement, it was adjudged and decreed, that there be judgment for the defendants, and that the plaintiffs pay the costs of suit. On motion of the plaintiffs, an appeal was ordered on the usual conditions; and

the transcript being returned to this Court, an early hearing was asked, under the statute providing for summary hearing in certain cases.

The argument here has been confined to the question of the constitutionality of the statute and ordinance, which we have considered with the care due to the great public importance of the subject.

The right of the legislature to delegate the power of taxation, for local purposes, to municipal authorities, is established in this State, and in our sister States, by an uninterrupted train of legislative precedents and judicial decisions. The necessity and propriety of such delegation are obvious. The Supreme jurisdiction has not leisure nor information to take cognizance of, and manage, all the matters which concern a particular locality. The interests of a particular town, or county, are best understood, and can be best administered by its inhabitants, or persons of their choice, selected under legislative authority. Our own statute books, and those of our sister States, are filled with Acts creating these political corporations, whose powers are emanations from the legislative will, and subject to be enlarged or curtailed by that will, from time to time, as the wisdom of the legislature may dictate.

But it is said that, in the present case, the legislature has attempted to delegate to municipal bodies a power to tax for a purpose not local; that the constitution intended to confine the raising of money from the people for general purposes, to one body, the General Assembly of the State, and that body cannot evade the performance of the duty and shift the responsibility upon others.

This makes it proper to inquire, what is a local purpose, and how far the particular enterprise which this taxation was intended to aid, could, as regards the municipal corporation which is plaintiff in this cause, be considered as concerning its local interests and welfare.

This question is not a new one. On the contrary, it has been frequently subjected to rigorous judicial investigation, and its answer may be satisfactorily found in the illustrations which are presented in decided cases.

Thus in the case of *Goddin v. Crump*, 8 Leigh's Virginia Reports, the improvement of the James and Kenawha rivers was considered, as regards the city of Richmond, a local purpose, by reason of its connection with the commercial prosperity of that city; and, therefore, it was held that the legislature had not violated the constitution of Virginia in authorizing the city of Richmond to subscribe to the James River and Kenawha Company, to borrow money wherewith to make the subscription, and to levy a tax for the purpose, of paying the interest and redeeming the principal.

In the consideration of the question, *Tucker, J.* observed: "In the case of water-works, though the same be ten miles off, the Act for introducing the water is fairly a corporate act, because the want is experienced in the heart and through all the wards of the corporation, and the benefit is experienced within the limits, though the operations by which it is introduced are carried on without. So, too, the removal of the bar in James river, above Warwick, would be fairly a corporate act, since it would greatly redound to the advantage of Richmond, would benefit its trade, and diminish the charges which encumber and embarrass it. For though the work would be done beyond the limits of the city, the consequences or effects of it would be felt throughout its borders.

"If then the test of the corporate character of an act is the probable benefit of it to the community within the corporation, who is the proper judge whether

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a proposed measure is likely to conduce to the public interest of the city? Is it this Court, whose avocations little fit it for such enquiries? Or is it the mass of the people themselves—the majority of the corporation acting (as they must do, if they act at all,) under the sanction of the legislative body? The latter assuredly.”

In the case of *Nichol v. The Mayor of Nashville*, the precise purpose in question was considered; and it was held that the legislature of Tennessee had the constitutional power to authorize the corporation of Nashville to take stock in the Nashville and Chattanooga Railroad; that the making of the road was a legitimate corporate purpose of the corporation; and that it was legally authorized to pay for its subscription to the stock of the road, in either of the modes pointed out by the statute.

In the subsequent case of *Talbot v. Dent*, 9 B. Monroe, 526, the main question in the cause was, whether the legislature could constitutionally authorize the public authorities of Louisville, with the consent of the majority of the voters of the city, to subscribe for stock in the Louisville and Frankfort Railroad Company, and to pay for it by increased taxation upon the citizens. In the discussion of that question, one of the incidental points of inquiry was, whether in that instance the power was delegated and exercised for a purpose properly local, or within the legitimate objects of the local corporations. The Court considered the point as not requiring any labored argument. Substantially the same question, it said, had been discussed and decided by the Supreme Courts in the States of Virginia, Connecticut and Tennessee; and each of those Courts had affirmed the power of the legislature in their respective States, to authorize a subscription of stock, involving the power of taxation for its payment, by the corporate authorities of a city, under special legislative sanction, for the construction of a work of internal improvement, by which the facility of access, and of transportation to and from the city, is to be increased.

A signal exercise of this legislative power was exhibited in a statute enacted in 1848, authorizing the city of Philadelphia, the county of Allegany, the cities of Pittsburg and Allegany, and the municipal corporations of Philadelphia county, to subscribe for shares of the capital stock of the Pennsylvania Railroad Company, to borrow money to pay therefor, and to pay the principal and interest so borrowed. The exercise of this authority necessarily entailed additional taxation upon the inhabitants of the places designated. Before that statute, the right of a municipal corporation to subscribe for stock was strongly contested. A member of the bar, acting upon the invitation, which was made by this Court to the profession, to afford us assistance in the important constitutional question before us, has favored us with an opinion, prepared with his characteristic ability, by a jurist whose reputation is national. It is an opinion well worthy of perusal by those who desire to know the just limits of municipal power, when not aided by express legislation. But we are told by the Supreme Court of Pennsylvania, that, after the enactment, no one has contested the right of those municipal corporations to subscribe for the stock, and on its faith millions of dollars have been subscribed. See *Commonwealth v. Williams*, 1 Jones, 71.

If the decisions cited be true exponents of the law, as we think they are, their application to the present case is obvious. The contemplated Railroad passes through the territorial limits of this corporation, and has one of its termini there. If the enterprise is successful, the results which have been

experienced in other towns and sections of the Union, may be realized here. Its facilities of commerce may be enhanced, an impulse to industry within its limits be given, its population be augmented, its lands rise in value. Whether these prosperous results will ensue, is in the womb of the future. But it is evident that the legislature expected them, and it is clear that the Police Jury, and a majority of the voters so thought. The legislature plainly declared such an enterprize to be within the range of their corporate purposes—the Police Jury, acting under the legislative sanction, declared by their ordinance their opinion that the measure would conduce to the interest of their locality, and a majority of the taxpayers have concurred in that opinion. Whether their expectation is false, or well founded, is not, under such a state of legislation, a judicial question. We take it to be a well settled principle, that if the legislature can constitutionally exercise a power, it is to be presumed by the judiciary, in just deference to a co-ordinate branch of the government, that, in the particular case it was exercised discreetly, and with a deliberate and just regard to the interests of its citizens. See the opinion of *Chief Justice Shaw* in *Norwich v. The County Commissioners*, 18 Pick. 62.

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The peculiar nature of this work certainly can make no difference in the question of constitutional power. A few years ago railroads were unknown. But if the legislature in former years had authorized the construction, by a private corporation, of an ordinary road traversing the State, and had given permission to the Police Juries, through whose territorial limits it passed, to contribute to its completion by taking stock and by local taxation, if they thought it advantageous, we question whether any one in the community would have disputed such a grant of power upon the ground that such a road did not involve a local purpose. Surely the principle cannot be affected by the magnitude of the outlay, the extent of the enterprise, or the peculiar means by which the transportation of persons and property is to be effected. The subject of roads is a matter which, since the foundation of our government, has been submitted, in some form, by the legislature to the action of Police Juries, and this from the obvious consideration of their intimate connection with local wants and local purposes.

The defendants suggest another objection to this tax, which they say is to be found in the articles 108 and 109 of the constitution of 1852. Those articles are as follows: "Art. 108. The State shall not subscribe for the stock of, nor make a loan to, nor pledge its faith for the benefit of any corporation, or joint stock company, created or established for banking purposes, nor for other purposes than those described in the following article.

"Art. 109. The legislature shall have power to grant aid to companies or associations of individuals, formed for the exclusive purpose of making works of internal improvement, wholly or partially within the State, to the extent only of one-fifth of the capital of such companies, by subscription of stock or loan of money, or public bonds, but any aid thus granted shall be paid to the company only in the same proportion as the remainder of the capital shall be actually paid in by the stockholders of the company; and in case of loan, such adequate security shall be required as to the legislature may seem proper. No corporation, or individual association, receiving the aid of the State, as herein provided, shall possess banking or discounting privileges."

The constitution of 1852 was not in existence when the Act of 12th March, 1852, was passed. That Act is not inconsistent with the letter nor the spirit

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of the constitution of 1852, and consequently remained in force after its adoption, under the conservative effect of article 148. It is inadmissible to suppose that the Convention, which assembled after the passage of that law and closed its labors on the 31st July, 1852, was ignorant of its provisions. One of the reasons why a change of constitution was desired, as is well known and forms a part of our political history, was the popular wish to disembarass legislation from some of the trammels of the constitution of 1845. One of them was a prohibition to pledge the faith of the State for the payment of any bonds, bills, or other contracts or obligations for the benefit or use of any person or persons, corporation, or body politic whatsoever. In this respect a grave change was made by the constitution of 1852, whether wisely or imprudently time will determine. The legislature was authorized thereafter to grant State aid to companies or associations formed for the exclusive purpose of making works of internal improvement, wholly or partially within the State. The Opelousas, and the New Orleans, Jackson and Great Northern Railroads were already projected. The subject of internal improvements then occupied intensely the public mind. The people, assembled in Convention, were determined to place it in the power of future legislatures to foster and encourage them; a power which has since been exercised. It is unreasonable to suppose that the Convention, thus employed in advancing the momentous cause of internal improvement, desired to withdraw aid, already provided in the form of local taxation. Their object, on the contrary, was to originate a further stimulus by State aid, discreetly limiting, however, the extent to which State aid should be furnished. According to sound principles of interpretation, the action of the Convention of 1852 was rather an affirmance than a repeal of the existing law of March 12, 1852.

It is true the statute of 1852, imposes no limit of amount upon the subscriptions of municipal corporations; while the subsequently adopted constitution of 1852 does limit the grant of State aid. But it is clear this difference involves no constitutional repugnancy; and on the score of policy and prudence, there was a reason for limiting the power of the legislature, who were to impose a burden upon the entire population for purposes which might result in unequal advantages to portions of its inhabitants; while in the matter of local taxation, there was a safeguard in a greater identity of interests, and in the control of the vote of the taxpayers.

In concluding our remarks upon this branch of the subject, we desire not to be misunderstood. We would not be considered the advocates of a latitudinarian construction of municipal power in the matter of taxation, which is, perhaps, the greatest function of government in a republican country. We take this case as it is, not a grant of authority to tax, to be deduced from implication, but emanating from an express and unequivocal declaration of the legislative will. See *Stetson v. Kempton*, 18 Mass. 283; *Parsons v. Goshen*, 11 Pick. 398; *Anthony v. Inhabitants of Adams*, 1 Metcalf, 287.

Having thus considered the general power of the legislature to delegate to local political corporations the power to levy taxes of this nature, it remains to inquire, whether the conditions with which this grant of power is accompanied vitiate the grant—whether any invasion of the constitutional rights of individuals is involved in the peculiar mode in which the exercise of the power delegated is commanded to take place.

In considering this branch of the subject, we will first examine the objection which is made to the submission of the ordinance to the approval of the taxpayers, in the manner specified in the statute.

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Is such a submission really inconsistent, as was suggested at bar, with the genius of our institutions? If the Legislature could constitutionally confer on the Police Jury authority to pass a taxing ordinance, it would seem rather a safeguard against oppression, than the reverse, to qualify the power of requiring it to be exercised with the approbation of a majority of those who are to bear the burden. Certainly, one would be inclined, with much show of reason, to suppose that a system, sanctioned by the legislative will, and tested by a long experience in one of the oldest States in this Union—a State which was amongst the foremost in the struggle for constitutional liberty—could not well be inconsistent with the principles of representative government. If we look to Massachusetts, how do we find municipal matters managed there? If any change is to be introduced into the existing state of things, or if they wish to undertake any new enterprise, the Selectmen are obliged to refer to the source of their power. If, for instance, a school is to be established, the Selectmen convoke the whole body of the electors on a certain day, at an appointed place; they explain the urgency of the case; they give their opinion on the means of satisfying it, on the probable expense, and the site which seems most favorable. The meeting is consulted on these several points; it adopts the principle, marks out the site, votes the rate, and confides the execution of its resolution to the Selectmen. De Tocqueville, p. 65. White's Digest of the laws of Massachusetts, p. 1147.

The system practiced in Massachusetts is not unknown in other States.

Thus, in *Burgess v. Pae*, the suit arose in Maryland out of a seizure on execution for school taxes, which had been voted for at a meeting of the taxable inhabitants of a school district. In the statement of the case, and upon which the cause was argued, it was objected that the acts to provide for the public instruction of youth in primary schools throughout the State were unconstitutional and void, because the validity and operation of the same, in any county of the State, was dependant on the votes of a majority of the voters of each county.

The point was made that the acts in question destroyed all accountability for the power of taxation, contrary to the fourth section of the bill of rights, and also that they imposed taxes without the consent of the Legislature, contrary to the twelfth section of the bill of rights.

The remarks of the Court upon these points seem to us equally applicable to the present controversy under our own Constitution. "We think," said the Court, "there was no validity in the constitutional question which was raised by the appellee's counsel in the course of his argument relative to the competency of the Legislature to delegate the power of taxation to the taxable inhabitants, for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools. The object was a laudable one, and there is nothing in the Constitution prohibitory of the delegation of the power of taxation in the mode adopted, to effect the attainment of it. We may say that grants of similar powers to other bodies, for political purposes, have been coeval with the Constitution itself, and that no serious doubts have ever been entertained of their validity. It is, therefore, too late at this day to raise such an objection. The ground of the objection taken in the argument to the constitutionality of the tax, seemed to be that the act of the Legislature delegating the power of taxa-

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tion to the taxable inhabitants, was a violation of the fourth and twelfth sections of the bill of rights, the first of which provides 'that all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct,' and the last, 'that no aid, charge, tax, fee or fees, ought to be set, rated or levied under any pretence, without consent of the Legislature.' It is not perceived how the act in question can be deemed a violation of either of those principles of the fundamental law. The tax was certainly levied with the consent of the Legislature, because the power to impose it emanated from the legislative department of the government, and was expressly given by a law passed for that purpose; and there is nothing in it which can be considered as in the slightest degree impairing the responsibility of the law-making power to their constituents for the due and faithful execution of the trust confided to them; because, if deemed to be unwise or inexpedient, an expression of the popular will to that effect was all that was necessary to procure its repeal. 2 Gill's Reports, 19.

So, in Ohio, a tax was resisted as illegal and void which had been assessed by the trustees of a township, upon a vote of the majority of the electors, to meet a subscription for the capital stock of a plank road company, under authority to that effect of an act of the Legislature incorporating the company. For the complaining tax payers, it was insisted, just as here, that the portion of the charter of the company which authorized the trustees of townships to subscribe stocks, upon the vote of a majority of the electors, was opposed to section four of article eight of the Constitution of Ohio, which declares that 'private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation, in money, be made to the owner;' that it took from the minority their property without their consent, and without compensation, and also compelled them to become stockholders in a private corporation, and subject to all its burdens. For the respondents, it was contended that the law fell under the taxing power of the Legislature, and was designed to aid the public improvement of a section of the State by local taxation, with the consent of a majority of the people, and it was urged that large sums had been subscribed by the counties, cities and towns of the State, under laws like the one then under discussion, or differing only in the circumstance that in that law the tax-payer had a right, but was not compelled to receive stock for the tax he paid. The resistance of the complainants was unsuccessful; the Court saw no cause for issuing an injunction. *Western Law Journal*, vol. 7, 220.

Several instances of valid conditional laws are noticed by the Supreme Court of Pennsylvania, in the case of *Larker v. the Commonwealth*, 6 Barr, 507, which was cited as an authority in their favor by the counsel for the defendants, but which, if attentively examined, will be found to be the reverse. In that opinion the case of taxes for school purposes was noticed, and the validity of laws on that subject, which subjected the levy to the approbation of the inhabitants of the respective school districts, was expressly recognized. The same remark applies to the case of *Rice v. Foster*, 4th Harrington, 495-6. The subject was also noticed by the Pennsylvania Court in 8 Barr, 395, and 10 Barr, 216, in which a strong illustration of the faculty of conditional legislation is cited.

The act of Congress of 9th July, 1846, submitted the question of the retrocession to the State of Virginia, of the county of Alexandria, in the District of Columbia, to a vote of the qualified electors of that county. Virginia had pre-

viously enacted a law signifying her willingness to take back the county, whenever the same should be retroceded by the Congress of the United States. Congress enacted the law of 9th July, 1846, submitting the question to the qualified electors, providing the machinery for the election, and enacting that if a majority of the electors should be against accepting the provisions of the act, it should be void and of no effect; but if a majority of voters should be in favor of accepting, then it should be in full force. And in that event it should be the duty of the President to inform the Governor of Virginia of the result of the election, and that the law was consequently in force. After stating the facts of that case, the Supreme Court of Pennsylvania forcibly remarks: "Many of the most profound constitutional lawyers of the Union were in Congress at that time; and the State of Virginia never hesitated to accept the retrocession, because the Congress of the United States delegated to the people the decision of the question. This act, under all the circumstances, must, therefore, be considered as high authority as a precedent in the development of the constitutional functions of the legislative power." See also the opinion in the case of *Strickland v. the Mississippi Central Railroad Company*, recently decided, and in which many of the questions in this case were ably considered.

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Several instances of conditional legislation are to be found in our own statute books.

Thus, in 1839, the question of the removal of the seat of justice from the town of St. Francisville, and its establishment at another point in the parish of West Feliciana, was submitted to the vote of the people of the parish. Acts of 1839, p. 58. Similar legislation respecting the parish of Avoyelles will be found in the Acts of 1842, p. 284; respecting the parish of Calcasieu, 1848, p. 88; respecting the parish of Vermillion, 1848, p. 25. See also the Acts respecting the consolidation of the municipalities of New Orleans, Nos. 202 and 241, Acts of 1850.

In conclusion upon this point, we have to say that we find nothing in the statute of 1852 repugnant to the Constitution, or the spirit of representative government; and it seems to us a matter of surprise that the caution of the Legislature, in its grant of the taxing power, should be made a subject of reproach. We think, on the contrary, there was a praiseworthy discretion in thus allowing the voice of the people of the respective parishes to be expressed, instead of authorizing the local authorities to conclude definitively the imposition of a burden for a novel and untried purpose.

It is said that, although the Police Jury might subscribe for stock itself, it could not subscribe for stock for any one of the inhabitants, nor for all the inhabitants in their individual capacities; that the intent and effect of the law is to force individuals to take and pay for stock in a railroad, whether they wish it or not; whether they think the enterprise likely to be beneficial or not; and that such a proceeding is mere spoliation for the benefit of a private corporation.

This reasoning and these assertions misinterpret the purpose of the law, and involve a doctrine subversive of all taxation.

The purpose of the law was to enable political corporations to aid, by taxation, in the completion of public improvements, which, it was supposed by the Legislature, would redound to their local advantage.

The burden imposed was a tax, with regard to which each citizen has not a right to decide authoritatively for himself alone, whether the tax is for a useful purpose, and will redound to his individual advantage. If each citizen can be



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN

NEW ORLEANS,

IN

NOVEMBER AND DECEMBER 1853.

PRESENT.

HON. THOMAS SLIDELL, *Chief Justice.*

<p>HON. C. VOORHIES, HON. A. M. BUCHANAN, HON. A. N. OGDEN, HON. J. G. CAMPBELL.</p>	}	<p><i>Associate Justices.</i></p>
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CITY OF NEW-ORLEANS *v.* COCHRANE, BULLARD & Co.

The 35th section of the Act of 23d February, 1852, provides a summary mode of proceeding by the city of New Orleans against defaulting tax payers—and substitutes a constructive notice by advertisement, in place of personal citation. This, being in derogation of common right, must receive a strict construction, and will not, therefore, be applied to the collection of taxes assessed before the passage of the Act.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Parker*, for plaintiffs, *Clarke & Bayne*, for defendants and appellants.

OGDEN, J. The 35th section of the Act of the Legislature, approved February 23d, 1852, entitled an Act "to consolidate the city of New Orleans and provide for the government and administration of its affairs," provides that all city taxes, except levee dues, shall be payable only in the office of the City Treasurer, from the first of May to the first of July of each year. That the Treasurer shall, by notices in the public newspaper pointed out by the Common Council, notify the tax payers to appear at his office for the payment of their taxes, and further provides, that on the first Monday of July, of each year, the Treasurer shall put in suit, in a Court of competent jurisdiction, all unpaid bills for taxes, and shall by an advertisement published in the official newspaper of the Council, cite all defaulters to appear in fifteen days from the date of the first insertion of said advertisement, before the respective Courts in which the bills are put in suit, and answer to the demand—that no petition shall be necessary, but that the tax bill shall be considered as a petition, and no other service of citation shall be necessary. The defendant having been condemned by a judgment rendered without citation, in pursuance of the

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remedy given by that Act, to pay a tax assessed against him in favor of the Second Municipality previous to the Act of consolidation, asks for its reversal on the ground that he was not cited. The Act of the Legislature, relied on by the plaintiffs in support of the right claimed, to proceed without petition or citation, as required in ordinary cases, provides a summary mode of proceeding and substitutes a constructive notice by advertisement in place of personal citation, which was previously required to authorize a judgment against defaulting city taxpayers—the law being in derogation of a common right, must receive a strict construction, and we do not think ourselves authorized to extend its application to the collection of taxes assessed to one of the Municipalities, previous to the passage of the Act of consolidation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be reversed, that the suit be dismissed, and that the plaintiffs pay the costs of both Courts.

Re-hearing refused.

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HEIRS OF LALAUURIE v. F. A. WOODS.

The lessor may enforce his privilege on the furniture in the leased premises—though the lessee reside in another parish.

The failure of the lessee to pay the rent authorizes the lessor to swear that he has good reason to apprehend that the property will be removed from the premises leased.

A PPEAL from the Second District Court of New Orleans, *Lea, J. LeGardeur*, for plaintiffs. *Race & Foster*, for defendants and appellants.

BUCHANAN, J. This is a suit for arrears of rent due for a house in New Orleans, leased by plaintiffs to defendant. The plaintiffs sued out a writ of provisional seizure against the furniture contained in the house, and pray for judgment against the defendant; and further, that the judgment herein to be rendered, may be satisfied by privilege and preference out of the sale of the property provisionally seized.

There is no dispute as to the indebtedness, but the defendant and appellant relies upon a declinatory exception—that the Court of the first instance was without jurisdiction *ratione personae*, his domicile being in the parish of West Baton Rouge.

As to the fact of defendant's domicile, there can be no doubt. It is not only proved by his witnesses, but it is stated in the contract of lease, and alleged in the petition. The only question is, shall it defeat his creditor's remedy upon the contract entered into between them?

The lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased. C. C. art. 2675.

It cannot be presumed by the Court, from the mention in the lease of the residence of the lessee being in a different parish from that in which the leased property was situated, that the lessor intended to renounce the right given him by the article 2675 of the Code. Without an expressed renunciation of that right, it was a part of the contract between the parties; and could only be en-

forced by a Court having jurisdiction over the place where the movable effects pledged for the fulfillment of the contract, were situated. To deprive the plaintiffs of a recourse to that jurisdiction, would be, in substance, to deprive them of their legal right under the contract.

In the case of *Henning v. Steamer St. Helena and owners*, 5 Annual, 349, the Supreme Court, overruling the case of *Hollander v. Nicholas*, 3d Robinson, 7, declared that the only way to carry out the intention of the legislator when he conferred the privilege for seamen's wages, is to consider the privilege as following the object upon which it is by law attached, and to permit the creditor to lay hold of that object for the satisfaction of his claim in whatever part of the State he finds it. If this principle be correct in reference to a vessel, which is constantly changing its location, and, according to the course of its voyages, is in widely different parts of the country, and even of the world, at different times, it is still more applicable to the case of the furniture of a house situated in a different parish from that of the lessee's residence, and which, by the uses to which it is applied and the right of pledge in the lessor, is fixed and confined to the house leased, and can never be seized at the parish of lessee's domicil.

The appellant has objected that the case of *Henning v. Steamer St. Helena* does not authorize the action *in personam*. This proposition seems warranted by the reasoning of the Court in the case cited, and we will accordingly restrict the operation of this judgment to the property seized.

The appellant's counsel have brought to our notice an interlocutory judgment rendered upon a rule to quash the provisional seizure, upon the ground (among others) that the affidavit upon which the writ issued, was untrue. The affiant swore, as required by law, that he had good reason to believe that the lessee would remove the furniture, or property on which the plaintiffs had a privilege, out of the premises, &c. We have lately said, in the case of *Wallace v. Smith*, that the failure to pay the rent constitutes a good reason for the lessor to apprehend that the property *may be* removed from the premises leased. In addition, it is proved in the present case, by the testimony of defendant's own witness and agent, that he had advertised the furniture for sale before its seizure.

It is, therefore, adjudged and decreed, that the judgment of the District Court be so amended as to restrict the operation of the said judgment to the property provisionally seized, reserving to plaintiffs their right of personal action against the defendant at the parish of his domicil; that in other respects the judgment be affirmed; and that the costs of the District Court be paid by defendant, those of appeal by plaintiffs and appellees.

CHARLES ARMSTRONG v. HIS CREDITORS—J. A. TURNELL, Opponent.

An appeal will be dismissed when all the parties to the judgment are not made parties to the appeal.

APPPEAL from the Fourth District Court of New Orleans, *Reynolds, J. G. B. Duncan*, for opponent and appellant. *Whittaker*, for syndic. *J. Q. Bradford, Stansbury & Ardey*, for creditors.

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BUCHANAN, J. This case is before us on two appeals from a judgment of the Fourth District Court of New Orleans, upon a tableau of distribution.

The first question to be disposed of, is a motion to dismiss the appeals for want of proper parties. The appellant, *J. A. Turnell*, was put upon the tableau as an ordinary creditor for the sum of \$1,655. He opposed the tableau on the grounds:

1st. That he was a creditor of insolvent for the sum of \$10,037, with interest and costs.

2. That he was a *privileged* creditor for said amount.

3d. That certain persons named, to wit: *W. Monaghan, J. S. Cazeneuve, J. S. Whitaker, S. T. Taylor*, syndic, are improperly ranked as creditors upon said tableau.

4. That certain persons are improperly ranked as creditors with privilege of the fourth class on the tableau. The parties thus opposed are not named in the opposition, but by reference to the tableau their names appear to be: *Melville & Co., Numa Lacoste, J. B. Berten, Wolfe & Singleton, Robt. Gamble, Henry Florance, George Gottschalk* and *A. Schloss*.

The judgment of the Court below dismissed *Turnell's* opposition, and he appealed. His petition of appeal prays that the syndic, and those creditors who specially opposed his (*Turnell's*) claim, might be cited to answer the appeal. The bond of appeal of *Turnell* is in favor of *Sewell T. Taylor*, syndic, and of *Melville & Co.*, as appellees.

The record shows that the claim of *Turnell* was opposed by other parties besides those mentioned in his petition and bond of appeal, and also that the judgment of the Court below recognized the validity of the claims of many of those opposed by *Turnell*, and who have not been made parties in any manner to this appeal. Yet this appellant, in his points filed in this Court, has asked that all the claims opposed by him in the Court below be rejected.

The other appeal is taken by *B. Bradley* and others, who have opposed the tableau, claiming to be ranked thereon as privileged, instead of ordinary creditors, and adopting, in other respects, the opposition of *John A. Turnell*, with the exception of said *Turnell's* claim to a privilege which they contest.

The petition of appeal of these appellants prays for citation against the syndic and all others in interest. Their bond is given in favor of the syndic alone. It does not appear that citations of appeal have been served upon any of the numerous parties in this cause, who are interested in maintaining the judgment of the District Court, with the exception of the syndic and two other creditors, namely: *Williamson, Zaratini & Gratiaa*, and *Melville & Co.*

This case appears to come clearly within the rule so often announced in this Court: "Whoever claims relief at our hands against a judgment, must bring before us all the parties thereto, who have an interest in its remaining undisturbed." 15 L. R. 863. 3 Rob. 436. 5 Rob. 224. 12 Rob. 203.

It is, therefore, adjudged and decreed that the appeals herein filed be dismissed, with costs.

Re-hearing refused.

CLAIBORNE MYERS v. DAVID MYERS—JOHN L. HENLEY, Third
Opponent.

If the possession of property in Louisiana has commenced by force or fraud, practised within the limits and jurisdiction of a sister State, and in opposition to the authority and judicial process of her Courts, such property must be returned to the State from which it was thus taken, and the parties remitted to that jurisdiction to settle their rights.

The release by the plaintiff in attachment in Mississippi, of any claim on the Sheriff resulting from his allowing the slaves attached to remain with the person holding possession of them, in no way invalidates the seizure.

In Mississippi the Sheriff who seizes slaves may retain possession of them, as well through the agency of a keeper, or an overseer, as by one of his deputies.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Bonford & Finney and Chilton*, for plaintiff and appellant. *Goold*, for opponent.

ODGEN, J. The third opponent, who is the Sheriff of Harrison county, Mississippi, claims the custody and possession of twenty-three slaves who were seized and put in possession of the Sheriff of the parish of Rapides, by virtue of a writ of *fiery facias*, from the Fourth District Court of New Orleans, in the suit of *Claiborne Myers v. David Myers*. He alleges that, on the 25th of December, 1851, the said slaves were lawfully in his possession, as Sheriff, in the State of Mississippi, by virtue of a writ of attachment from the Circuit Court of Harrison county, in a suit of *Samuel F. Butterworth v. David Myers*; that the said *David Myers*, on or about that time, forcibly and feloniously took said slaves out of his possession and carried them to the parish of Rapides, where, by collusion between himself and his brother, *Claiborne Myers*, the plaintiff in this suit, the said *David Myers* caused the slaves to be seized in satisfaction of the judgment obtained against him by his brother. *Claiborne Myers*, in his answer, denies generally the allegations in the opposition, and specially that the opponent ever had custody of the slaves in his capacity of Sheriff. He sets forth that he had obtained a judgment, in November 1847, against *David Myers*, which had been duly recorded in the parish of Orleans, the place of residence of *David Myers*, and had thereby acquired a judicial mortgage on these slaves, who were then in the State of Louisiana. He further alleges that the existence of this judicial mortgage was well known to *Butterworth*, and that, in order to defeat it, he, *Butterworth*, had caused the slaves to be carried into the State of Mississippi, in order to subject them to his pretended claim. By a peremptory exception, subsequently filed, he relies on two additional grounds of defense; one, that if the opponent, or Sheriff, had ever levied on the negroes by process of attachment, he had abandoned and released the possession immediately after the levy was made; the other, that the attachment, under which the Sheriff claimed the right, had been quashed and the suit dismissed, by a final judgment between *Butterworth* and *David Myers*.

The view we have taken of the law which ought to govern the case, renders it unnecessary to notice many of the points raised on the argument, and a great deal of testimony applicable only to those points. We consider the only questions to be, 1st. Whether the slaves were lawfully in the custody of the opponent, as Sheriff, in the State of Mississippi—2d. Whether they were forcibly and feloniously taken out of his possession, and brought to this State.

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Claiborne Myers may be entitled to the judicial mortgage on the negroes, which he asserts; and *Butterworth* may have resorted to improper means to defeat the mortgage by causing the negroes to be conveyed into the State of Mississippi. On the other hand, the judgment of *Claiborne Myers* against his brother *David Myers*, may be collusive and simulated, and designed to protect the property from the pursuit of *Butterworth*; all of which the parties reciprocally charge to be true. We express no opinion on those questions, considering them foreign to the issue. Nor do we even think it necessary to decide the question, so much argued at bar, as to the effect of the judgment in Mississippi, dissolving the attachment and dismissing *Butterworth's* suit. It may result, by virtue of that judgment, that the negroes will be restored to the defendant in Mississippi, or it may be that, by effect of a writ of error, with a supersedeas, either already or hereafter to be obtained, the possession of the negroes will be continued in the Sheriff. These questions we do not feel ourselves called on to decide.

If the possession of the parties in Louisiana has commenced by force or fraud, practised within the limits and jurisdiction of a sister State, and in opposition to the authority and judicial process of her Courts, we hold the rule stern and inflexible, that such possession must terminate as soon as an appeal is made to our laws; that the property must be returned to the State from which it was thus taken, and the parties remitted to that jurisdiction, to settle their rights. This doctrine has been repeatedly recognized in our State. See cases, *Powell v. McKee*, 4th Ann. 108; *Wingate v. Wheat*, 6th Ann. 241, and *Paradise v. Farmers' and Merchants' Bank*, 5th Ann. 711. The fact that the property was clandestinely taken by *David Myers* out of the possession of *Baylor*, who was appointed keeper by the Sheriff, is fully established, and it is shown that force would have been resorted to, if it had become necessary, to accomplish the object. The case is, therefore, reduced to the single question whether the negroes were lawfully in the custody of the opponent as Sheriff, at the time they were thus removed. It is contended, 1st. That the Sheriff was never in possession of the negroes under the writ of attachment, because, before the seizure, he was authorized by the plaintiff in the writ to leave the negroes in the possession of *Kendall*, to whom they were then hired. 2d. That according to the statute of Mississippi, it was necessary the Sheriff should have held possession of the negroes, either by himself or by a deputy, to be appointed in writing and with certain formalities prescribed in the statute. It appears that *Baylor*, the keeper appointed by the Sheriff, was in the employment of *W. G. Kendall*, to whom *David Myers* had hired the negroes. The written agreement or consent of *Butterworth*, the plaintiff in the attachment, to release the Sheriff from any liability resulting from his leaving the negroes, when attached, in the possession of *Kendall*, did not affect the seizure by the Sheriff, which appears, as well by his return as by the evidence, to have been made with all the formalities prescribed by law. The Sheriff's responsibility to *Butterworth* has only thereby diminished. The statute of Mississippi relating to the appointment of deputies, has no application. The Sheriff could as well have retained possession by a keeper or overseer, for whose acts he was responsible, as by his deputies. It was made his duty, by law, to provide for the sustenance and support of the negroes until they were sold or legally discharged from the attachment; and this he was to do on his own responsibility, as to the means to be employed. In the performance of that duty, for his own safety,

he might deem it necessary to incarcerate the negroes; but it would be a barbarous provision of law to require him to do so, in order to render the seizure a legal one. The legal seizure and custody of the negroes, under the attachment in Mississippi, was in every respect complete, and the plaintiff, *Claiborne Myers*, whatever his rights may be, cannot avail himself of the clandestine removal of the negroes to this State by his brother, *David Myers*, to defeat the attachment in Mississippi.

It is, therefore, ordered, that the judgment of the Court below be affirmed, with costs.

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PETER CONREY v. HIS CREDITORS — DUPONT DE NEMOURS & Co.—
Opponents.

All the creditors of an insolvent, privileged as well as ordinary, should be made parties to the tableau, and accordingly notified. In a *concurso*, all the creditors of the insolvent are considered as plaintiffs and defendants, and their respective claims, whether privileged, mortgage or ordinary, must be settled contradictorily on a tableau of distribution. A separate tableau among a particular class of creditors cannot be viewed but as irregular, and not sanctioned by law.

APPEAL from the Second District Court of New Orleans, *Lea, J. Durant & Horner*, for the opponents and appellants. *E. A. Bradford*, for the syndic.

OGDEN, J., (CAMPBELL, J., absent.) On the 28th of October, 1852, the syndic of the creditors of the insolvent filed a tableau of distribution, showing the sum of \$110,100 90, cash on hand. The claims classed as privileges and mortgages amount to the sum of \$85,370 78, leaving a balance of \$8,973 17, for the ordinary creditors. The tableau also exhibits a list of notes, the proceeds of sales of real estate, purporting to be for the benefit of the general creditors. The names of the ordinary creditors are not specified in the tableau.

J. E. Dupont de Nemours & Co. opposed the tableau, on the ground that they were not placed thereon as ordinary creditors for the amount of a judgment obtained by them against the insolvent, and as privileged creditors for the costs.

The opposition was dismissed by the Court below, chiefly on the ground that the tableau did not purport to make a distribution of funds among the ordinary creditors, but merely exhibited a balance of cash and notes on hand to be thereafter distributed among them.

We think the Court below erred. Under the act of 1837, the duties of syndics are explicitly prescribed. Whenever any funds come into his hands as such, he is required to make a tableau of distribution, containing the names of the several creditors of the insolvent debtor, the sums due them respectively, and the amount to be distributed among them, either as privileged, mortgage, or ordinary creditors. It was, therefore, essential that all the creditors of the insolvent, privileged as well as ordinary, should have been made parties to the tableau, and accordingly notified. In a *concurso*, all the creditors of the insolvent are considered as plaintiffs and defendants, and their respective claims, whether privileged, mortgage, or ordinary, must be settled contradictorily on the tableau of distribution. A separate tableau of distribution among a particular class of creditors, therefore, cannot be viewed otherwise than as irregular, and not sanc-

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Although we consider that the opponents were entitled to be placed on the tableau as ordinary creditors for the amount of their claim, yet we are not prepared to say that they were entitled to be paid out of the funds reserved by the syndic. We think the Court below should have ordered the tableau to be amended by inserting thereon the names of all the ordinary creditors, and the sums due them respectively. As all the creditors on the bilan are parties to the *concurso*, it appears to us the syndic is bound to notice their claims. Had this been done, it would have met the requirements of the law, and the injury apprehended by the Court below, in considering the other ordinary creditors as third persons, would not have resulted.

It is, therefore, ordered, adjudged and decreed that the judgment of the Court below be reversed; that the opponents be placed on the tableau, as ordinary creditors, for the amount of their judgment, and as privileged creditors for the costs of suit recovered by said judgment; that the tableau be amended by inserting therein the names of all the creditors, and the sums due them respectively, as required by law; and that new publication be made. It is further ordered that the costs of opposition be borne by the estate.

JAMES FARNET & NOEL & GUIRAUD v. THEIR CREDITORS—JOSE MARTINEZ DEL CAMPO, Opponent.

The landlord loses his privilege by permitting fifteen days to elapse after the removal of the goods, without taking action to secure his privilege.

It is impossible to give to an amicable arrangement by an insolvent with a part of his creditors, without a formal assignment and a formal possession, the effect of a *cessio bonorum*, by which the rights of creditors are fixed at the date of the surrender. Therefore, the landlord's privilege is not preserved by such an amicable arrangement, fifteen days having elapsed after the removal of the goods.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Magne*, for insolvents. *Schmidt*, for opponent and appellant.

SLIDELL, C. J. *Martinez del Campo*, the owner of a house occupied by the insolvents, was placed on the tableau of distribution as an ordinary creditor. He opposed the homologation on the ground that he should have been ranked as a privileged creditor. His opposition was unsuccessful, and he appealed.

In the beginning of April, 1852, the goods were removed from *Del Campo's* house, and put on storage in another building. On the 29th May, *Farnet*, one of the partners of *Noël & Guiraud*, made a surrender, and the usual insolvent proceedings took place. The District Judge was of opinion that *Del Campo* had lost his privilege in permitting more than fifteen days to elapse, after the removal from the premises, without taking any action. In this opinion we concur. The 2675th Article of the Code gives the lessor a right of pledge on the movable effects of the lessee, which are found on the property leased. And Article 2679 enlarges the right in these words: "In the exercise of this right the lessor may seize the objects, which are subject to it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified."

It is said that the landlord's rights were preserved in the interval between 1st of March and the surrender, by an amicable meeting of creditors, at which liquidators were appointed, who were to take charge of the property and act as trustees of all the creditors, until the will of the foreign creditors could be ascertained; the creditors present at the meeting, meanwhile, consenting conditionally to a settlement with the insolvent firm. On an examination of the testimony, which is loose and in some degree conflicting, we find that the creditors present represented a portion only of the liabilities of the firm. They verbally appointed three persons, *Barbry*, *Honold* and *Farnet*, liquidators to supervise the management of the concern; but no formal assignment was made, and they did not take formal possession of the assets.* When *Farnet* went away in April, the business of the house was left in the hands of *Honold*, not, it would seem, as trustee for the creditors, but as attorney of the two partners, *Farnet* and *Guiraud*. It is impossible to give to an amicable arrangement of this sort, made by a portion of the creditors, the effect of a *cessio bonorum*, by which the rights of creditors are fixed at the date of the surrender. If formal assignment had been made, and possession had been given, it might have created an equity in favor of *Del Campo* against the creditors who took part in the assignment, but certainly against none others.

Judgment affirmed, with costs.

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117 590

FRANCOIS DUBOIS v. LOUIS FERRAND.

The declarations of the wife are not admissible in evidence against the husband.

In an attempt to make the admission of the wife evidence for the husband, on the ground that she acted as his agent, it is essential to show not only the agency, but that the admission itself appeared closely and intimately connected with the subject matter of the agency. The mere fact of a note having been executed in favor of the wife, does not, *per se*, create the presumption that she acted as the agent of her husband. If she acted as his agent in making a settlement for him, in which the note in question was given, that fact should have been shown.

A PPEAL from the Third District Court of New Orleans, *Kennedy, J. Dufour* and *A. Robert*, for plaintiff. *Preaux* and *Lambert*, for defendant and appellant.

BUCHANAN, J. The plaintiff alleges that the defendant is indebted to him on three promissory notes, in the sum of \$398.

The defendant avers that the plaintiff is indebted to him in the sum of \$81; that the plaintiff had declared, in presence of witnesses, that the defendant, after a settlement, owed him nothing, but, on the contrary, he was indebted to the defendant for sundry small amounts furnished him for the purpose of defraying his daily expenses; that the note of \$233 in suit, executed in favor of the plaintiff's wife, was given by him in renewal of three promissory notes, two of which constitute a part of the plaintiff's demand, and the last, for \$68, is, as he verily believes, still in the plaintiff's possession; and, lastly, that the plaintiff is indebted to him in the sum of \$314, on fourteen due bills, or bonds, annexed to his answer, which he pleads in compensation. Whereupon, he prays that the plaintiff "be condemned to pay him \$81, after deducting the amount of said note of \$233."

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The District Court allowed the sum of \$304, as the correct amount of the due bills claimed by the defendant, in compensation, and gave judgment in favor of plaintiff for the sum of \$94, as the balance due him on the notes sued upon. From this judgment the defendant appealed.

On the trial, several witnesses were examined and testified as to the declarations of the plaintiff in relation to the alleged settlement between the parties, posterior to the dates of the notes sued upon. There is no allegation nor proof of the nature of the claims or matters involved in that settlement, and no evidence introduced to show the alleged renewal of the notes.

The District Judge was of opinion, and we concur with him, that the defendant proved the sum of \$304, which was the only amount claimed by him as a credit; that the averment in relation to the plaintiff's admissions was obviously intended to aid the subsequent averment, that the note for \$233 was given in renewal; and that no proof whatever existed of the alleged fraud, unless it could be inferred from the plaintiff's admissions, which were insufficient.

Our attention has been directed to several bills of exceptions in the record. We concur with the District Judge, that the declarations of the wife are not admissible in evidence against the husband. But, it is contended, that this case forms an exception to the rule, the wife having acted as the agent of her husband. To lay a proper foundation for such evidence, it is essential not only that the agency should be shown, but that the admission itself appeared closely and intimately connected with the subject matter of the agency. The mere fact of a note having been executed in favor of the wife, does not, *per se*, create the presumption that she acted as the agent of her husband. If she acted as his agent in making a settlement for him, in which the note in question was given, that fact should have been shown.

In relation to the other bills of exception, we think that the testimony was properly ruled out, on the ground of its irrelevancy. The facts sought to be proved had clearly no connection with the allegations or the pleadings.

The conclusion to which we have come on the merits, renders it unnecessary for us to consider the motion to dismiss the appeal.

It is, therefore, ordered, adjudged and decreed that the judgment be affirmed, with costs.

JOHN B. WALLACE v. H. F. SMITH.

The failure of a tenant to pay the rent, authorizes the landlord to make affidavit that he has good reason to fear the property may be removed from the premises leased.
The landlord has a lien on goods on storage to the amount of storage due.

A PPEAL from the First District Court of New Orleans, *Larue, J. Whittaker*, for plaintiff. *Livingston*, for defendant and appellant.

BUCHANAN, J. This is an appeal, taken from a verdict of a jury rendered for a number of months rent of a warehouse, at the corner of Perdido and Carondelet streets. The verdict was rendered in three consolidated suits, and we have looked through the evidence without finding a syllable of proof upon which the appellant can reasonably be supposed to expect to reverse the verdict.

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The appellee has asked us to review the interlocutory judgments of the Court below, which set aside the provisional seizures in two of these consolidated suits.

In the first of the suits, No. 7689, a rule was taken on the plaintiff, to show cause why the writ of provisional seizure issued in the case should not be set aside, on the grounds, first, that the affidavit was untrue, and that defendant was ready at all times to pay the rent due; second, that the property seized was not liable to seizure.

In order to sustain these two points, defendant introduced evidence to show that he carried on the storage business, and that he was constantly receiving and sending away goods kept on storage. He also offered in evidence the writ itself, requiring the sheriff to seize the movable property on the premises, and also an inventory describing the nature of the movables seized. He furthermore offered in evidence the suit between the same parties, No. 7469, brought for the purpose of expelling defendant from the premises, on which said suit there is a judgment in favor of plaintiff, from which defendant has appealed. He also showed that he had deposited with the sheriff, a day or two after the seizure, the sum of \$500; which evidence embraced all that was offered on the rule by the defendant, and on which said seizure was set aside.

Plaintiff, on the contrary, showed by the evidence of *Mr. Crane*, that defendant had offered to make him a bill of sale of certain carriages belonging to him, and which had been consigned to him originally by one *Mr. Saml. Oliver*, but for which he had settled with the said *Oliver*, and taken the carriages to his own account; that said carriages were worth, say \$1500; that defendant did not wish him to take them as a *bona fide* sale, but simply as nominal owner thereof. This occurred about a week prior to the seizure, and was evidently done for the purpose of screening said property from seizure. He further proved that some carriages and buggies, belonging to defendant, had been removed shortly before the seizure.

In suit 7822, consolidated with the last by order of Court, a rule was also taken to set aside the provisional seizure issued, on the following grounds: first, that the affidavit was untrue; second, that the seizure of any sums due for rent in the hands of sub-tenants, is illegal; third, that said seizure was made from malicious motives, and to vex and harass defendant. In this case, evidence of a similar character with that in the preceding case was offered, except that plaintiff also offered in evidence the lease of defendant to his sub-tenant, *Wilson*. It does not appear by the record that any seizure was actually made.

In each case, the affidavit for the provisional seizure was made in strict conformity with the 285th Article of the Code of Practice. The law gives to the landlord a privilege, and even a right of pledge, upon the property contained in the premises leased, to secure the payment of the rent. For the purpose of enforcing this lien, he is entitled to a writ of provisional seizure, upon making oath that he has good reason to fear the property may be removed from the premises leased.

In our opinion, the failure to pay the rent constitutes such good reason. In the case before the Court, other circumstances justified the allegation of fear of removal. The defendant had on the premises property for sale. Of course, when a purchaser should offer, and the sale be effected, the property would be removed. Such transactions were in the daily course of defendant's business. And even as to property on storage, and which was liable at any time to be re-

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moved on the order of the parties storing, the landlord had a lien to the extent of the storage due.

The circumstances mentioned seem to be entitled to the more weight, in view of the fact of arrears of rent being due when the seizure was sued out. We think the writ of provisional seizure should have been maintained in these cases.

It is, therefore, adjudged and decreed that the verdict of the jury and judgment appealed from, be affirmed, with costs in both Courts, and with the privilege of lessor on the property provisionally seized.

JOHN B. WALLACE v. H. F. SMITH.

The Act of 21st March, 1850, which gives the landlord a summary process for the expulsion of a tenant is not in violation of Articles 118 and 119 of the Constitution of 1845.

Proceedings under this statute are summary, and are tried without a jury.

When, after prayer for trial by jury, the parties proceed to trial without a jury, and no bill of exceptions is taken, it will be presumed that the jury is waived

APPEAL from the First District Court of New Orleans, *Larue, J. Whitaker*, for plaintiff. *Livingston*, for defendant and appellant.

BUCHANAN, J.* This is a suit by summary process instituted by a landlord against his tenant, under the Act of 21st March, 1850, to expel him from the premises leased.

The petition alleges the lease to have been by the month, and that the notice required by the Civil Code in such cases had been given before the institution of the suit.

The answer pleaded a contract of lease, different in its terms from that set forth in the petition.

Upon these pleadings the parties went to trial, and judgment having been rendered in favor of plaintiff, the defendant has appealed.

The cause is before us upon a statement of facts. From this, it appears, that the plaintiff *substantiated* the material allegations of his petition by evidence in the Court below; and that a witness named *Morgan* was examined for defendant, who swore that he heard plaintiff say the defendant might keep the premises until improvements were made, and that he should receive sixty days notice to quit. The statement of facts also shows that this witness, *Morgan*, had made, on the trial of another suit between the parties, statements inconsistent with the evidence given by him in this cause. We agree with the Judge of the District Court that no credit is to be given to the evidence of this witness. The judgment of the Court below is fully sustained by the other evidence.

The appellant appears to rely upon an exception, filed by him, of unconstitutionality of the law on which these proceedings are based. The 118th and 119th Articles of the Constitution of 1845, it is contended by him, are violated by this law.

We have examined those articles, in connection with the statute of March 21st, 1850, and perceive no foundation for the plea.

* OGDEN, J., declined sitting, and CAMPBELL, J., was absent on the trial of this cause.

The appellant also urges that his answer contained a prayer for trial by jury, which was denied him.

The present action is summary, and summary cases are tried without the intervention of a jury. C. Pr. 757. In addition to which, it may be observed that the parties seem to have gone to trial, in the Court below, before the Judge alone, without any opposition made on either side to that form of trial. In the absence of a bill of exceptions, we are bound to presume that the defendant waived his prayer for a jury.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MUNICIPALITY NO. ONE PRAYING FOR THE OPENING OF ORLEANS
AVENUE — EXECUTORS OF JOHN McDONOGH, Appellants.

Under the Act of 1832, providing for the opening of streets in New Orleans, there must be published in the newspapers a notice of the day on which the Commissioners will present to the Court their estimate and assessment for confirmation. A certificate of the Clerk of the Court is not evidence of such publication. It must be proved, under oath, as other facts are proved.

A PPEAL from the First District Court of New Orleans, *Larue, J. Grivot*, for appellants. *Wolf*, for the Municipality.

BUCHANAN, J. This case comes before us upon an assignment of errors to a judgment of homologation of an assessment made by Commissioners, appointed under the provisions of the Act of 1832, page 132, entitled "An Act to regulate the opening, laying out, and improving streets and public places in the City of New Orleans and its suburbs, incorporated and non-incorporated, and in the banlieues of the same."

The only error assigned which requires to be noticed, because we think it is sufficient to remand the cause, is that there was no evidence of the publication by the Commissioners of the notices or advertisements which they are bound to give, according to law.

The law relied upon by appellants is found in Section 3d of the Act of the Legislature above mentioned. It reads as follows: "The said Commissioners shall deposit a copy of such estimate and assessment with the Clerk of the Court by which they were appointed, for the inspection of whomsoever it may concern, and shall give twenty days notice by advertisement, to be published three times within the first fifteen days, in at least two of the public newspapers printed in the City of New Orleans, in the French and English languages, of the day on which the report of said estimate and assessment will be presented to said Court for confirmation."

The report of estimate and assessment appears to have been deposited by the Commissioners in Court on the 2d March, 1852; but we do not find in the record any proof that they published the notice required by law of the day on which they would present said report to the Court for confirmation. What is presented to us by the attorney of the city as proof of this fact, is nothing but a certificate of the Clerk of the Court "that the notices of the Commissioners of estimate and assessment, &c, have been published in the French and English languages, &c." It was clearly no part of the official duty of the Clerk

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of the Court to give such certificate. The notices were no part of the record; they were not, in fact, to be given by him, but by other persons. He would, no doubt, have been a competent witness to prove the notices; but he was not sworn as a witness, and his certificate must, therefore, go for nothing. It may be remarked, in addition, that even considering the certificate as full proof of all that it contains, it does not show that any, or, if any, what day was stated in the advertisement as that on which the report would be presented to the Court for confirmation.

It is, therefore, adjudged and decreed, that the judgment of homologation of the Court below, appealed from, be reversed, and that the cause be remanded for further proceedings, according to law, the appellee to pay the costs of this appeal.

GEORGE W. LEWIS v. MARY ANN HARE, WIDOW OF EDWARD D. LEWIS.

By Article 1698 of the Code, "the testament falls by the birth of legitimate children of the testator posterior to its date," and it makes no difference if a child be born before or after the death of the testator.

The positive provisions of Article 1698 is in no manner affected by Article 1556, which provides that revocation of donations *inter vivos*, through the birth of children to the donor, operate only up to the disposable portion.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge, J.* *A. N. Ogden*, for plaintiff and appellant. *Cohen*, for defendant.

SLIDELL, C. J.* In April, 1888, *Edward D. Lewis*, a resident of Louisiana, made an olographic will, by which, after providing for the payment of his debts, he gave to his wife all his furniture and a piece of land, which was equal in value to about one-half of his estate; to a sister, two thousand dollars; to a brother, one thousand; to another brother, *George W. Lewis*, the plaintiff, one thousand dollars; to *L. W. Broadwell*, one thousand dollars; and the residue to his wife. His health was impaired at the time of making his will, and in the following May, upon the advice of his physicians, he went with his wife to Europe. *Broadwell*, who was on terms of intimacy with him, and one of the objects of his bounty, testifies that the testator, before his departure, informed him the will was made, and he appointed executor; that from the tenor of the testator's conversation on the occasion, as on others, he thought the testator was not aware when he made the will that his wife was pregnant, and from the impaired state of his health believed it unlikely that such would be the case, and therefore made no provision for an heir. The testator died at Nice, in September, 1888, and a few days afterwards his wife gave birth to a child. The will was probated soon after his death, in New Orleans. The inventory exhibits a total amount of \$10,923. The present suit is brought by *George W. Lewis*, against the widow, as administratrix and tutrix of the child, to recover the legacy of one thousand dollars, and the defence is that the subsequent birth of the child revoked the will. There was judgment for the defendant in the Court below, and the plaintiff has appealed.

* *Ogden, J.*, absent.

The Code devotes a section to the subject "of the revocation of wills and their caducity," and by Article 1698 provides as follows: "The testament falls by the birth of legitimate children of the testator posterior to its date." The reason of this provision is not given by the law-givers, but is obvious. It is founded upon the reasonable presumption that the testator would not have given his property to others had he foreseen that he would afterwards have offspring. It would not be easy to suggest a case more strongly illustrative of the wisdom of the law, which supplies by its own foresight the want of foresight of the testator, than the one before us. If this will should be carried into full effect, the entire estate of the testator would be absorbed in legacies, and his child be left destitute.

It is contended, on the part of the plaintiff, that the article should only be applied to the case of a child born before the death of the testator. The language used is broad and unqualified, and, as the law has made no distinction, we have no right to make one. Moreover, there is no reason to suppose that a testator would have been insensible to the welfare of a posthumous child, if the contingency of its birth had suggested itself to his mind, any more than to suppose such insensibility in the case of a child born before his death. In both cases, it is reasonable to presume the testator would have felt the promptings of parental love, and the obligations of parental duty, if the event had been foreseen.

The plaintiff refers to the 1556th Article of the Code on the subject of the implied revocation of donations, *inter vivos*, a subject also separately treated. By that article the revocation, through the birth of children, to the donor, is made to operate only up to the disposable portion, and the plaintiff contends that it should operate to that extent only in the present case. Why the law-giver thought proper to make a distinction between donations, *inter vivos*, and donations by will, may not be very obvious. But the language of Article 1698 is unambiguous. It makes the will entirely inoperative where legitimate children of the testator are born posterior to its date, and we have no right to disregard the distinction thus clearly made between the two kinds of donations, even if it be an arbitrary one. The two subjects, the revocation of donations *inter vivos*, and the revocation of donations by testament, are treated separately, and if we were permitted to call in the provisions in the one case, to explain those in the other, it would be proper only where doubtful language had been used.

The words "even of a posthumous child," used in the Article 1556, which was taken from the Napoleon Code, are not found in Article 1698, for which there is no corresponding Article in the Napoleon Code. We do not think this a sufficient reason to narrow the terms of Article 1698, which are unqualified, and comprehend equally both classes of children.

It must also be observed, that by Article 29 of our Code, "children in their mother's womb are considered, in whatever relates to themselves, as if they were already born."

Judgment affirmed, with costs.

ALEXANDER LEVY & Co. v. THE MUTUAL BENEFIT LIFE AND FIRE
INSURANCE COMPANY — C. W. HORNOR, Receiver.

E. W. SEWELL v. SAME — Consolidated Case.

The Company was organized on the mutual principle, its sole capital consisting in the premiums paid by those who insured with the Company; and the notes for premiums constituted a reserved fund for the payment of losses, which the Directors, under their charter, had no authority to divert from the payment of the losses to which they were specially affected.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Durant and Cohen*, for *Hornor*, appellant. *Benjamin & Micou*, for *Sewell*, appellee.

ODGEN, J. This suit was instituted to enforce an act of pledge of the notes of the shareholders in the Company. The Directors made the pledge in favor of the plaintiff, to secure the payment of a sum of money which they borrowed from him. After the suit was brought, the defendants were declared insolvent, a receiver appointed to administer their assets, and this cause was transferred from the Second District Court, and ordered to be cumulated with the proceedings in liquidation of the Company. The receiver, in his answer, denies the authority of the Directors to pledge the notes of the Company in favor of the plaintiff, and asks to have them delivered over to him. The notes thus pledged were given by the stockholders for premiums on insurance due by them to the company. The twelfth section of the charter of the corporation provides that if losses are sustained by the Company to a greater amount than they have funds on hand to discharge, the Directors shall assess such deficiency in a rateable proportion on the members of the Company, according to the amount of each member's insurance, provided such assessment shall not exceed the amount of the premium note or obligation given by each member. The Company was organized on the mutual principle, its sole capital consisting in the premiums paid by those who insured in the Company, and the notes on hand for premiums constituted a reserved fund for the payment of losses. There is no special power in the charter by which the Directors would be authorized to make any other use of the premium notes, than the one thus pointed out by the section referred to. The act of the Legislature of 16th of March, 1848, providing for the organization of corporations, requires that the charter of the Company shall contain a distinct enumeration of the powers of the Directors. The power claimed as resulting by implication from the general powers conferred on the Directors, is not consistent with the peculiar provision above alluded to, and we think the Directors had no authority to divert the notes from the payment of the losses of the Company, to which they were specially affected.

The judgment of the Court below is, therefore, reversed, and it is ordered and decreed that the plaintiffs deliver to the receiver, *Charles W. Hornor*, as representing the insolvent corporation, all the bills and notes described in the act of pledge, to be collected by him, and appropriated first to the payment of any losses of the Company; and that this case be remanded to the Court below to settle the rights of the plaintiffs in *concurso*, with the other creditors of the Company; the costs of appeal to be born by plaintiffs and appellees.

J. J. GOODMAN & SON v. WM. ALLEN et al;
 JOHN CARROLL v. GOODMAN et al;
 LEXINGTON INSURANCE CO. v. WM. ALLEN et al;
 JOHN CARROLL v. LEXINGTON INSURANCE CO.

The surety, on a bond for the release of property attached, cannot be made liable until the condition of the bond be broken and the principal put in delay.

APPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Mott*, for plaintiffs. *Semmes & Edwards*, for *Moses Greenwood*, appellant.

VOORHIES, J. The facts which give rise to this controversy are fully stated in the case between these parties, reported in 6th Annual, p. 373. *John Carroll*, as third opponent, claimed the ownership of the steamboat New Hampshire, attached in several cases, which were consolidated. By order of the Court, he was permitted to bond the steamer for the sum of \$3200. The condition of the bond is, that he, as principal, and *Moses Greenwood*, as surety, "agree to abide by the order of the Court, and, under the same, are responsible for safe return and restoration of the steamer New Hampshire, to abide the further order of the Court." The only judgment rendered in those consolidated cases, was a judgment in favor of the plaintiffs against the defendants, "with privilege on the property according to the order of the respective attachments." It is silent as to *Carroll*, the intervenor. On the return of *nulla bona*, on a writ of *fieri facias*, issued on that judgment, the plaintiffs took a rule on *Moses Greenwood*, the surety on the bond, to show cause why he should not be condemned to pay the plaintiffs the amount of the bond. The rule, on appeal, was discharged by the Supreme Court as in case of non-suit, the Court assigning as reasons, "that the creditors cannot ask judgment by rule against the surety, without a *fi. fa.* against, or, at least, a putting in default of the principal. No call by *fi. fa.* or otherwise, has been made upon *Carroll* for the restoration of the vessel or the payment of the bond." In his petition of intervention, *Carroll* claimed his residence at Pittsburg, Pennsylvania. He died at Cincinnati, Ohio, on the 1st of January, 1848. In November, 1851, *George W. Hynson* was appointed curator of his estate; and on the 17th of the same month, the plaintiffs filed a petition against him, alleging that the suits thus instituted by them against the defendants were consolidated only so far as the attachments were concerned, and that *Carroll* was allowed to take the steamer on the conditions stipulated in his bond. That the cases were submitted to the Court and judgment rendered thereon against the defendants, "but that no express judgment was rendered against the said *Carroll*." They pray that the claim of *Carroll*, and of his succession, to the steamboat New Hampshire may be rejected and disallowed, and that he be condemned to return the steamer to the possession of the Sheriff, and, in default thereof, that he be condemned as curator to pay them the sum of \$3200. The curator answered by pleading the general issue, and reiterating the averments of *Carroll*, whose succession he prayed be declared the owner of the vessel, and the bond released. *Moses Greenwood* filed the following appearance in this case: "*M. C. Edwards* and *T. J. Semmes, Esq's*, appear herein on behalf *M. Greenwood*, surety on the intervenor's bond, and as far as said *Greenwood's* interest is concerned they ap-

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pear also to defend the curator of the intervenor, the said curator is present in Court himself." On these pleadings the parties went to trial, and the District Court having rendered judgment in favor of the plaintiffs against *Moses Greenwood* for the sum of \$3200, the latter appealed.

We think the District Judge erred. As regards *Carroll's* claim to the steam-boat *New Hampshire*, it is obvious that the question still remains unsettled; and it is equally obvious that the object of this suit was not intended to involve any other issue. It is clear that the surety cannot be made liable until the condition of the bond be forfeited, and the principal be put in delay. But it does not devolve upon us to say, whether the question of title to the vessel can affect the rights of the plaintiffs, as the cause of action is for damages resulting from a collision by that vessel.

The appellees complain of the judgment of the inferior Court, and pray that it be amended, so as to give them a judgment for the amount claimed against the succession of *Carroll*. We are not prepared to say that they are entitled to such relief, as there was no judgment rendered by the inferior Court on their demand against the succession, and the latter is not appellant.

The conclusion to which we have come renders it unnecessary to notice the bills of exceptions in the record.

It is, therefore, decreed, that the judgment of the District Court be reversed, and that there be judgment in favor of the appellant as in case of non-suit, the costs of suit in both Courts to be borne by the plaintiffs and appellees.

DAVID MOORES v. D. G. WIRE,

By the Act of 1844, the legislature intended to afford protection to the sub-contractor, or workman, or the furnisher of materials, against payments made in anticipation: and, under that statute, the delivery of the attested account fixes the rights of the parties at time of the delivery.

APPEAL from the Third District Court of New Orleans, *Kennedy, J.* *Collins*, for plaintiff. *Benjamin & Micou* and *F. Haynes*, for defendant and appellant.

VOORHIES, J. On the 20th of July, 1851, *C. J. Miller* contracted with the defendant for the erection of a two story brick kitchen and other work, according to specifications and plans annexed to their contract, and obligating himself to furnish all the materials and labor necessary to complete the same in a workmanlike manner. The price stipulated for this work was \$2000, payable in the following proportions, viz: 1st. \$850 when all the brick walls shall have been completed. 2d. \$500 when the whole of the work contracted for shall have been finished and the keys delivered. 3d. \$650 in three months after date of delivery of said *buildings*, to be secured by a note of hand of that amount payable, &c." On the 15th of August, 1851, the undertaker received the full amount of the first instalment, under this contract, and then abandoned the work and absconded.

The plaintiff furnished materials to the undertaker for the building to the amount of \$509 78, an attested account of which was duly served on the defendant on the 28d of August, 1851.

The question presented in this case is, whether the payment to the undertaker was premature, or made in anticipation.

After a careful examination, it appears to us that under the terms of the contract, which are clear and explicit, the completion of all the brick walls was essential to entitle the undertaker to the payment. The evidence shows, that such was not the case.

In a recent case, we had occasion to express an opinion as to the construction of the Act of 1844, on which the present action is founded. The principal object which the legislature had in view, in the enactment of that law, was to afford protection to the sub-contractor or workman, or the furnisher of materials, against payments made in anticipation. "The delivery of the attested account fixes the rights of the parties at the time of such delivery." Had the undertaker, in this case, done or completed the work or buildings, before the delivery of the attested account, it is obvious that the defendant would not have incurred any liability to the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

JEAN BOURBON v. LEWIS CASTERA et al.

Action against three defendants to annul a will and for damages. Each filed an exception that there was a misjoinder of actions. C. specially excepted on the ground that his co-defendants were made parties for the purpose of depriving him of their testimony. The exceptions were sustained, as to the co-defendants, and the suit dismissed as to them—but the plaintiff's right to proceed against C. was maintained. Plaintiff appealed—and on motion to dismiss the appeal because C. had not been made a party to it—it was *Held*: that C. should have been made a party. The dismissal of his co-defendants from the suit is a judgment which he has the greatest interest in maintaining, as he specially excepted that they were made parties in order to deprive him of their evidence. Appeal dismissed.

A PPEAL from the Second District Court of New Orleans, *Lea, J.* BUCHANAN, J. (VOORHIES, J. dissenting.) The plaintiff is appellant from a judgment which dismisses his suit as to the defendants *Arthur Fleming* and *Felix Percy*.

A motion to dismiss the appeal is made on the ground that *L. Castera*, the principal defendant, and the most interested party in the maintenance and affirmation of the judgment appealed from, has not been made a party to the present appeal.

The appeal was by motion: and the appeal bond is made in favor of *Fleming* and *Percy*, their executors, administrators and assigns.

It is necessary, for the purpose of understanding the merits of this application, to state the nature of the suit, and the pleadings in the cause.

This suit has a double object: to annul a nuncupative testament by authentic act for want of a disposing mind and capacity in the testator and of legal formalities; and also to recover damages from the universal legatee, and from the notary and witnesses who drew and subscribed the will, *in solido*, for illegal acts and doings in the premises.

To the petition, which contained this prayer for cumulative remedies, exceptions were filed, severally, by all the defendants who have been cited, namely,

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the universal legatee *Louis Castera*, the notary *Felix Percy*, and one of the subscribing witnesses of the will, *Arthur Fleming*. Each of these parties excepted that there is a misjoinder of actions—that the action for damages is premature—and that the plaintiff is not the heir at law and next of kin, as he pretends, but an officious intermeddler. In addition to these exceptions, *Louis Castera* specially charges and excepts that the plaintiff had made his co-defendants parties defendant herein, for the purpose of depriving him of the testimony of the persons thus illegally made defendants.

All the exceptions came on regularly for trial at the same time in the Court of the first instance, and were tried and submitted for decision together.

The judgment is in the following words: "The Court having duly considered the exceptions filed by the defendants to plaintiff's petition, for the reasons assigned in the written opinion, this day delivered and on file, it is ordered, adjudged and decreed, that the exceptions filed herein by *Arthur Fleming* and *Felix Percy* be maintained, and that so far as relates to said defendants the suit be dismissed. It is further ordered, that the right of the plaintiff to proceed in the said suit as against the defendant *Castera* alone, be maintained."

It appears to us, that *Castera* should have been made a party to the appeal. It is very evident that the dismissal of his co-defendants from the suit, is a judgment which he has the greatest interest in maintaining. He makes it a special ground of exception that he needs the evidence of his co-defendants upon the matters tending to the annulling of the will, which is an issue that concerns himself alone; and that he is in danger of losing the benefit of that evidence, by the cumulation of distinct causes of action and the joinder of distinct liabilities and defendants, which this petition contains.

The judgment appealed from must be viewed as much the property of *Castera*, (Code of Practice, art. 548,) as of *Fleming*, or of *Percy*.

Appeal dismissed, with costs.

VOORHIES, J. (dissenting.) This suit is instituted by the plaintiff as sole heir of *Jacques Germain Thierry*, who died in New Orleans about the 16th of March, 1852. The action is founded principally on the allegation, that the succession of the deceased is withheld from the plaintiff in consequence of the unlawful combination and contrivance of the defendants *Louis Castera*, *Felix Percy*, *Jean Crevolin*, *Joseph Nicolas* and *Arthur Fleming*; the first, the instituted heir, the second, the notary, and the three last named, the witnesses to a pretended will, made in favor of *Castera*, by virtue of which the latter took possession of said succession, worth upwards of \$20,000. The plaintiff avers, that said will was made at a time when the deceased was mentally and physically incapable of making a will, of which the defendants were aware. He, therefore, prays that the will be declared null—that *Castera* surrender the succession, and that all the defendants be condemned to pay him, *in solido*, the sum of \$5000 for their illegal acting in the premises.

This action was met in the District Court by exceptions on the part of *Castera*, *Percy* and *Fleming*, in which they averred, in substance, that *Castera* was the only party in interest against whom the action to annul the will of the deceased could be legally brought, the plaintiff having maliciously and fraudulently made the others parties for the purpose of depriving him of their testimony—that the plaintiff had joined two distinct causes of action against several defendants, when it was apparent, from his own showing, that *Castera* was alone interested in the first pretended cause of action, in which the other de-

defendants had no legal interest whatever; and that the second alleged cause of action could not, at any rate, be prosecuted until the first, for the nullity of the will, was determined, &c. The exceptions were filed separately. The plaintiff is appellant from a judgment sustaining the exceptions of *Percy* and *Fleming*.

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The judgment is in these words: "Each of the defendants except to the petition filed herein, on the ground that distinct causes of action cannot be urged against different defendants in the same suit. The nullity of the will has no necessary connection with the claim for damages so far as all of the defendants, except *Castera*, are concerned, and the principle on which the exception rests appears to me correct. The Court, having duly considered the exceptions filed by the defendants to plaintiff's petition, for the reasons assigned in the written opinion this day delivered and on file, it is ordered, adjudged and decreed, that the exceptions filed herein by *Arthur Fleming* and *Felix Percy* be maintained, and that, so far as relates to the said defendants, the suit be dismissed. It is further ordered, that the right of the plaintiff to proceed in said suit, as against the defendant *Castera* alone, be maintained."

The appeal bond is in favor of *Fleming* and *Percy*.

The appellees have filed a motion to dismiss this appeal, on the ground that *Castera*, who has an interest in maintaining this judgment, has not been joined or made a party to the appeal. In support of the motion, the appellees rely on the cases reported in 9 L. R. 473; 12 *ibid*, 475; 12 R. R. 180; 5 Ann. 174; 4 *ibid*, 577; and on the case of *Cousin v. Blanc*, Opinion Book, No. 23, p. 159. In those cases, it is said, that the principle recognized as our settled practice and jurisprudence is, that the appellate Court will invariably refuse to take cognizance of an appeal, and will dismiss it, whenever it shall appear that all the parties having an interest in the maintenance of the judgment, are not before the Court. It is urged, that *Castera* has an interest in the affirmance of the judgment appealed from, *because it secures to him the advantage of a separate and distinct trial from the notary and the witnesses*, and is the only party that would really suffer by the reversal of the judgment, *as he would be deprived of his best, if not sole evidence in the case—that of the notary and witnesses*.

The action, in this case, is clearly an action founded on an offence, or quasi-offence, under the provisions of articles 2294 and 2804 of our Code. In an ordinary action to annul a will in relation to the incapacity of the testator, arising from mental infirmity, or other causes, I apprehend the argument of the appellees' counsel would have much weight. But does it apply in the present case, where the instituted heir, the notary, and the witnesses are all charged with collusion in making the pretended will? I cannot think so. Though it may be considered a great hardship by the party to be deprived of the testimony of his co-defendants, yet, from the very nature of the transaction or collusion charged against him, it seems to me, that their interest in the subject matter must be considered identical, and such as to exclude the testimony of one in favor of the other. The action being one purely of *tort*, where all the parties are bound *in solido* for the damages resulting therefrom, it follows, therefore, that none of them should be discharged from the action. I am unable to concur in the opinion of the District Court, that two separate and distinct causes of action are embraced in the plaintiff's petition. I consider a collusion in making a false will as constituting the cause of action, and the damages merely the consequence of the act perpetrated. If the act be declared to

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be the production of fraud and collusion, it also follows as a consequence, that the party who holds the property under it, is bound to surrender it. Thus it appears to me that the damages and the surrender of the succession, are matters which are incidental to the principal action. As fraud or collusion is never presumed, except in certain specified cases, and this is not one of them, but must be supported by proof, it is clear that if the plaintiff fails to make good his allegations, by legal and competent proofs, no injury whatever can result to the appellees. I do not consider a prosecution of the notary under the Act of the 7th of June, 1806, as a necessary pre-requisite to the right of action in this case.

Tested according to the principles which I have advanced, ought the motion in this case to prevail?

It is necessary, in the first place, to inquire whether there is any judgment in favor of, or against *Castera*; and, in the second, if so, what is the nature of the interest which he has acquired under it. It is clear that *Castera*, so far as his pecuniary liability is concerned, cannot be affected either by the affirmance or reversal of the judgment. Having assumed, by his exception, the whole liability, it appears to me quite immaterial whether, in that respect, the appellees be joined again in the action with him. But it is urged, that *Castera* has acquired a right under the judgment to the benefit of the testimony of the appellees.

The question presented then is, whether the interest, or benefit, acquired by *Castera*, under the judgment, is such as to require him to be made a party to the appeal. The cases on which the appellees rely for success, do not, in my opinion, bear them out. There is no doubt but what the rule is clearly settled, that all the parties must be cited, or made parties to the appeal, who have an interest to maintain in the judgment which is sought to be reversed or amended. But that interest, in my opinion, means such an interest as the party has in the subject-matter in dispute, and not to extraneous circumstances, or such an interest or benefit as *Castera* expects to derive from the testimony of the appellees.

I am, therefore, of opinion that the appeal ought not to be dismissed.

BACH, BARNETT & Co. v. ABRAHAM LEOPOLD—A. LEVY, Intervenor.

The revocatory action cannot be exercised by individual creditors until their debts are liquidated by a judgment, unless the defendant in such action be made party to the suit for liquidating the debt, brought against the original debtor. Code, 1967.

APPEAL from the District Court, Third District, *Clarke, J. R. N. Ogden & Labatt*, for plaintiffs and appellants. *Dorsey*, for defendant. *Marks & Cotton*, for intervenor.

VOORHIES, J. The attachment obtained by the plaintiffs in this case, based on the provisions of articles 242, 243 and 244 of the Code of Practice, as amended by the Act of 1826, was levied on certain goods, as the property of the defendant. *A. Levy* intervened in the suit and claimed the ownership and

possession of the goods, and also \$1500 as damages resulting from the illegal seizure thereof. BACH, BARNETT
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The attachment was dissolved on the 1st of April, 1852. The grounds urged by the defendant for its dissolution, were, that the affidavit was untrue, irregular, and not in compliance with the requirements of law; that it was issued without the authority of the Judge; and that the bond was not legally executed. There are no reasons assigned in the judgment for its dissolution, neither does the record afford us any light on the subject. It appears that an appeal was taken from this judgment, but abandoned.

The defendant also pleaded, as a dilatory exception, the prematurity of the action. No disposition appears to have been made of this exception—indeed, it is very questionable whether any was necessary, as the attachment essentially constituted the basis of the action,

The intervention was filed on the 21st of April, 1852. The principal grounds of objection, urged by the plaintiffs, against the intervenor's demand, are, that the sale to him from the defendant is collusive, fraudulent and simulated; and if not simulated, that it is fraudulent and void, because it gives an undue preference or advantage to the intervenor over the other creditors of the defendant, whose insolvent circumstances were then well known to him.

The issues between these parties were tried by a jury, who found the following verdict: "We, the jurors, find a verdict that *A. Levy*, intervenor, is owner of the goods seized by the Sheriff in this case, and we also find a verdict for four hundred dollars damages in the intervenor, *A. Levy's* favor, and against *Bach, Barnett & Co.*" The judgment on this verdict is in these words:—"The Court considering the verdict of the jury and the law and the evidence being in favor of the intervenor, it is ordered, adjudged and decreed, that *A. Levy* be and he is hereby declared the owner of the goods seized by the Sheriff in this suit, and that the possession thereof be delivered to him. It is further ordered and decreed, that said intervenor and third opponent, *A. Levy*, recover of *Bach, Barnett & Co.*, the sum of four hundred dollars damages and the costs of suit." It is objected that this judgment is not pursuant to the verdict. We think otherwise. The ownership of the property and the assessment of the damages resulting from the illegality of the seizure thereof, obviously constituted the subject-matter in litigation which was submitted to the jury. The judgment rendered thereupon, decreeing the possession of the property to be delivered to the intervenor, was therefore merely incident to the verdict and essential to give it effect.

The third opposition in this case was evidently converted into a revocatory action. Article 1967 of our Code provides, that this action "cannot be exercised by individual creditors until their debts are liquidated by a judgment, unless the defendant, in such action, be made party to the suit for liquidating the debt brought against the original debtor, &c." 1 R. R. 525. As we consider this fatal to the plaintiffs' right of action, it is unnecessary for us to express any opinion on the other points presented in the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

UNITED STATES, FOR THE USE, &c. v. THE UNION BANK.

The Act of Congress of 8d March, 1849, which authorizes the Secretary of the Treasury to discharge the sureties of *Thomas Gibbs Morgan* from the payment of one-third of the judgment against them, on their paying or securing the residue, does not assign to the sureties the rights of the Government against parties with whom *Morgan* had dealt officially. The assignment made by the Secretary to the sureties, and the permission given by that officer to them to use the name of the United States for their benefit, was unauthorized by law.

As a general rule, it is more than questionable whether the Court, in an action of this kind, can disregard the uses, and give a judgment for the nominal plaintiff. But in the present case, public policy, no less than legal principle, and the peculiar facts disclosed in evidence, preclude us from allowing the uses to disappear, and to substitute another actor in their place.

The use of the name of the Government, with all its privileges and prerogatives, in the prosecution of individuals, for the benefit of other individuals, must be discountenanced by this Court.

APPEAL from the Third District Court of New Orleans, *Kennedy, J. Hunton* and *Benjamin & Micou*, for plaintiffs. *Denis* and *Durant & Hornor*, for defendant.

Benjamin & Micou, for plaintiffs :

The objections of the defendant on this point seem to be pointed against the power of the officers of the Government to collect the money claimed for the use of *Morgan's* sureties.

The plain answer to these objections is this : If the defendant be really liable under the facts stated in the petition, (and they must be taken as true for the purposes of this argument,) then none but the United States have the legal right to sue, and the statement in the petition that the suit is brought for the use of others cannot impair this legal right. It is a matter with which the defendant can have no concern, whether the money is to go into the public treasury, or into the coffers of private persons. The only right of a party defendant under such circumstances, is to demand that the suit be brought in such form as to render the decision, if given in his favor, final and conclusive—or if against him, to protect him from any claim by other parties on the same cause of action. In the present case the parties are such as to secure this result, and there is, therefore, no right in defendant to inquire into the fact whether or not *Morgan's* sureties will profit by a decision in favor of plaintiffs. It suffices for him to know that the decision in this cause will be forever final, as to the right of action, whether that decision be favorable or adverse to his pretensions. 2 Hennen's Dig. p. 1178.

Denis and *Durant & Hornor*, for the Bank :

This suit was brought in the name of the United States without authority of law, and must therefore fall.

It is not in the power of any one, at his own choice, to bring a suit in the name of the United States; this is self-evident. Nor is it sufficient that he who brings the suit should simply be a United States officer; this is equally clear. He must be the officer vested by law with authority to institute judicial proceedings in their name, and in support of this we proceed to quote the statutes.

According to the evidence adduced on the trial, this suit, as far as the United States is concerned in it, is brought under the authority of the Solicitor of the Treasury. The powers and duties of that officer are prescribed by the act of 29th May, 1830, Sec. 1, (4th Statutes at Large, page 414) entitled "An Act to provide for the appointment of a Solicitor of the Treasury," which declares "that there shall be appointed by the President of the United States some suitable person, learned in the law, to be Solicitor of the Treasury; and that all and singular the powers and duties which are by law vested in, and required from the agent of the Treasury of the United States shall be transferred to, vested in, and required from the said Solicitor of the Treasury; and the said Solicitor of the Treasury shall also perform and discharge so much of the duties heretofore belonging to the office of Commissioner, or acting Commissioner of the Revenue, as relates to the superintendence of the collection of outstanding,

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direct and internal duties." The duties of Commissioner of the Revenue are defined by the sixth section of the Act of 8th May, 1792, 1st Statutes at Large, page 280, entitled "An Act making alterations in the Treasury and War Departments," and provides that the "Commissioner of the Revenue shall be charged with superintending, under the direction of the head of the Department, the collection of the revenues of the United States, other than duties on impost and tonnage." If under this the Commissioner had, by implication, the power to cause suits to be instituted, it may be granted that the Solicitor has the same, but only for the purpose mentioned in the act of 29th May, 1830, above quoted, viz: to enforce the collection of the outstanding, direct and internal duties, he would have no power to bring suit for the collection of duties on impost and tonnage, or to recover such from any party with whom they may have deposited.

The duties and powers of the "Agent of the Treasury," the only others vested in the Solicitor, are defined in the first section of the Act of 15th May, 1820, 3d Statutes at Large, page 592, entitled "An Act providing for the better organization of the Treasury Department," which says, "That it shall be the duty of such officer of the Treasury Department, as the President of the United States shall, from time to time, designate for that purpose, as the Agent of the Treasury, to direct and superintend all orders, suits, or proceedings in law or equity, for the recovery of money, chattels, lands, tenements, or hereditaments, in the name and for the use of the United States." Here is given, in regard to legal proceedings, merely the faculty of guidance and direction; he has no power to institute proceedings or prosecutions. If a Collector of Customs, Receiver of Public Moneys, or other public officer make default, the Comptroller of the Treasury must make out his account, and send it to the agent, with instructions to have process issued (see same Act and page, section two;) for the Agent or Solicitor can know nothing of the state of any man's account, and must himself wait for instructions on that head, before he can have suit brought for the amount found due. So, in case Congress should see fit to claim any particular lands or tenements, that body would order suit to be brought, and the Solicitor would guide, direct, and superintend the proceedings; but to order suits from his own prompting, he has no power, for, as is shown, none such is given to him. This power, so far as money due the United States is concerned, is lodged with another officer, viz: the Comptroller, as will be found by reference to the third section of the Act of September 2, 1789, entitled "An act to establish the Treasury Department," 1st Statutes at Large, page 66, which says "that it shall be the duty of the Comptroller to superintend the adjustment and preservation of the public accounts, etc. He shall, moreover, provide for the regular and punctual payment of all moneys which may be collected, and shall direct propositions for all delinquencies of officers of the revenue, and for debts that are or shall be due to the United States."

Here we find that it is the Comptroller alone who is clothed with authority to adjust accounts for money due the United States, and to originate prosecutions for its recovery, while it is the duty of the Solicitor to take the direction and superintendence of such suits after they have been ordered to be brought. In the present case no order ever emanated from the Comptroller to the United States Attorney in New Orleans, to institute suit against the Union Bank; his orders came from the Solicitor alone, who, as we have seen, had no power to give them, and the suit is therefore brought without authority, and must fall.

BUCHANAN, J. This suit is instituted in the name of the United States of America, "who sue for the use and benefit of *Thomas W. Chinn, Micajah Courtenay and Josiah Barker.*"

It appears that Messrs. *Chinn, Courtenay and Barker*, together with one *Davenport*, deceased, were the sureties upon the official bond of *Thomas Gibbs Morgan*, as Collector of the port of New Orleans; that after said *Morgan* resigned said office, suit was brought by the United States against him and his sureties for a large balance, alleged to be due by him to the public Treasury. A judgment was rendered in that suit against *Mr. Morgan* and his sureties, jointly and severally, for the sum of \$60,569 57. After this judgment, an act of Congress was passed for the relief of the sureties of *Morgan*, which act, being short, is here copied in full:

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"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be and he is hereby authorized to discharge *Thomas W. Chinn* and *Micajah Courtenay*, and the other sureties of *Thomas Gibbes Morgan*, late Collector for the District of Mississippi, from the payment of one-third of the principal and interest of a judgment rendered against them in the Circuit Court of the United States, in and for the Fifth Circuit and District of Louisiana, upon their paying or securing the payment of the residue of said judgment, to the satisfaction of said Secretary: provided, the Secretary of the Treasury shall not be authorised to make the compromise of the claim as aforesaid, unless he shall be satisfied that, from the parties' pecuniary ability, said Collector and his sureties, the said claim is not collectable; and also that it is for the interest of the United States such compromise be made. Approved 3d March, 1849."

Under this act of Congress, *Messrs. Chinn and Courtenay* proposed to the Secretary of the Treasury that, upon being credited with one-third of the judgment, they would pay the entire balance of the same, in equal annual instalments of one and two years from the 30th June, 1850—afterwards extended to one, two and three years—and for such payment to give such security as would be deemed good and sufficient by the District Attorney of Louisiana.

The Solicitor of the Treasury, *J. C. Clark*, in a report to the Secretary of the Treasury, dated the — June, 1850, recommended that the proposition thus made by *Chinn and Courtenay*, be accepted, being convinced that the principal and sureties were unable to pay the judgment, and that the interest of the United States would be promoted by making the compromise.

The Secretary of the Treasury, *W. M. Meredith*, having approved of this report, and referred the matter back to the Solicitor to have the amount adjusted, that officer, by a report dated June 21st, 1850, adjusted the amount to be paid for the two-thirds of the judgment and interest, and deducting \$17,000 paid on the judgment on the 19th April, 1848—at the sum of \$27,034 94, and directed said balance to be settled by six notes, of equal amount, two payable one year, two payable two years, and two payable three years after the 21st June, 1850; and the Solicitor further added, that upon *Chinn and Courtenay* furnishing the said notes, they might use the judgment for the purpose of compelling their principal (*Morgan*), and their co-sureties, *Barker* and the representatives of the estate of *Davenport*, to pay their just proportions of the amount to be secured to the United States by said *Chinn and Courtenay*; any money to be collected upon the judgment from *Morgan, Barker* or *Davenport's* representatives, to inure to the common benefit of *Chinn and Courtenay*; and in the event of either of them, *Morgan, Barker, and Davenport's* representatives, coming in and paying their proportion of the amount thus to be secured to be paid by the said *Chinn and Courtenay*, then the judgment shall inure to the benefit of said *Chinn and Courtenay*, and the party, or parties, thus coming in and paying his or their proportions, as aforesaid.

The Solicitor of the Treasury concludes this adjustment and report, by empowering *Chinn and Courtenay*, and any other of the defendants in the judgment who shall come in and pay their proportion as aforesaid, to use the name of the United States to recover from any person or persons, or from any corporation or banking institution, any amount of money which the United States might recover on the institution of suit against them, or any of them, and which they, or any of them, are liable to pay, on account of any moneys by said

Morgan deposited with them, or either of them, as Collector of the port of New Orleans, and by them, or either of them, paid over to the said *Morgan* illegally, the United States to be saved harmless from all costs and charges incurred in consequence of their name being used for such purposes.

It has appeared to us, after an attentive consideration of the evidence, that this contract of *Messrs. Chinn and Courtenay* with the Treasury Department, as it is styled by *Mr. Chinn*, in a letter addressed by him to the Secretary of the Treasury on the 22d July, 1850, has mistaken the letter and the spirit of the act of Congress of the 3d March, 1849, for the relief of the securities of *Thomas Gibbes Morgan*. Congress is alone competent to make a gift of the property of the United States. The judgment against *Morgan* and his sureties was undoubtedly the property of the United States. The act declaratory of the will of Congress, in relation to it, is as clear as it is brief. It authorizes the Secretary of the Treasury to discharge *Morgan's* securities from the payment of one-third of the judgment, on their paying or securing to their satisfaction the payment of the residue of the judgment. This was clearly a release made by Congress to certain debtors of the nation, of one-third of their debt, on condition of their paying or securing the other two-thirds. Such release was unaccompanied by any assignment to *Morgan's* sureties, of the rights of the Government against parties with whom *Morgan* had dealt in his official capacity. The assignment made by the Solicitor of the Treasury to *Chinn and Courtenay*, and the permission given by that officer to those gentlemen to use the name of the United States for their own benefit, are viewed by us as unauthorized by law, and as conferring no right whatever to maintain the present action.

It is possible that the United States may have a legal claim against the Union Bank, for moneys deposited in the Bank by *Morgan*, as Collector. We do not, however, consider ourselves required to go into the consideration of that question, at this time. In the present action, the real plaintiffs are *Chinn, Courtenay and Barker*. See 4 N. S. 135. 6 Rob. 17. Avowedly, any judgment that we might render herein against the defendant, would inure to their benefit. The pretended assignment of the rights of the United States by the Solicitor of the Treasury, is an essential part of the plaintiff's case, and has been so treated by us in this opinion. The decision to which we have come being adverse to the validity of the assignment, the action must fail.

It has been contended by the counsel for plaintiffs, *en dernier ressort*, that although the United States have brought this suit for the use and benefit of individuals, yet the Court may enter up judgment herein in favor of the United States for their own benefit, should the assignment be declared invalid.

As a general rule, this is more than questionable. We have seen that in an action of this kind, our jurisprudence considers the usee as the real plaintiff. The statement of the petition gives the Court to understand that the interest is in *him*. It seems anomalous that the Court should give judgment in favor of a party not, in reality, interested in the suit.

But, in the present case, public policy, no less than legal principle and the peculiar facts disclosed in evidence, preclude us from allowing the usees to disappear from the scene of litigation, and to substitute another actor in their stead.

The letter of *Thomas W. Chinn*, to the Secretary of the Treasury, of the 22d July, 1850, claims as a right, under his contract with the Treasury Department, the immediate transmission and "full and faithful" assignment to *Courtenay* and himself, of "the judgment obtained by the United States against *Morgan*

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UNION BANK. and his sureties," as well as of "all claim or lien which the United States may have against the Union Bank of Louisiana;" "we, the said *Courtenay* and *Chinn*, to have and enjoy all the rights and benefits that may accrue to us from the said assignment." Accordingly, we find that the acting Solicitor of the Treasury, in a letter of the 10th August, 1850, addressed to the District Attorney of the United States, at New Orleans, informs that officer that *Messrs. Chinn and Courtenay*, having fulfilled all the stipulations of the arrangement made by them with the Secretary of the Treasury, on the 21st June, 1850, "are now entitled to all advantages which said arrangement accords to them, and it is the desire of the department that you render them every aid and facility necessary to their full enjoyment. To this end, you are hereby authorized to do any and every official act which may be necessary on the part of the Government to make them available and effective, *taking care that in all they may deem it their interest to do under the judgment against Thomas Gibbes Morgan and his sureties, or in proceedings against any other person, corporation, or banking institution, mentioned or referred to in said arrangement, they keep the United States free from all costs and expenses; it being clearly understood that whatever may be done, must be done at their own proper cost and charges.* I have enclosed to *Mr. Chinn* a copy of this letter, and informed him that he is now at full liberty to proceed as he may deem proper under the arrangement referred to." Three months after that letter was written, the petition was filed in the present suit—a petition signed by the District Attorney of the United States, the same to whom the letter was addressed; but the position of that officer in the suit is most distinctly defined by the letter itself. In the institution of the suit, he has but expressed the will of the uses, and the suit itself is entirely under the control of the uses, for their exclusive benefit, as it is at their exclusive charge.

This use of the name of the Government, with all its privileges and prerogatives, in the prosecution of individuals for the benefit of other individuals, without sanction of law, must be discountenanced by this Court. Were the claim against the defendant presented to us as a *bona fide* claim of the Government, divested of the circumstances which surround it, it would become our duty to examine and decide the important questions of law, relating to the liabilities of the Union Bank under its contracts with *Morgan*, as Collector. In its present shape, we cannot entertain the claim.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both Courts, and without prejudice to the rights of the United States, if any they have, against the defendant.

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It is only after the lessor has been called on, and his refusal or neglect to make repairs, that the lessee has authority to make them, and if, before such call, the repairs are negligently made by an employé of the lessee, the lessee is liable for damages. C. C. 2663, 2664.

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W. D. Hennen, for plaintiff and appellant.

Arts. 2663, 2686, declare that the lessor is bound to make repairs, such as were necessary to be made in this case. The lessor cannot fulfill this obligation

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if the lessee do not notify him of the necessity, as the former knows nothing of the condition of the premises. Accordingly art. 2664 makes it the duty of the lessee to notify the lessor—to call upon him to make them. The counsel for defendants says, at page 8 of his brief, that the words of the law are, *may* call, not *shall* call, and *may* cause, not *shall* cause, the repairs to be made. And that, therefore, the lessor is under no obligation to notify the lessee, and that if he chooses to make the repairs without first calling upon the lessor, he only incurs the penalty of paying the costs of them himself. *Qui hæret in literâ, hæret in cortice*. Let us look at the law more closely. The article in question declares that “if he (the lessor) *refuse or neglect* to make them, the lessee may himself cause them to be made.” etc. Thus, then, according to the very words of the law—and it is the words which the defendants invoke—the lessee may cause the repairs to be made, *only, however, on one condition*, to wit; *if the lessor refuse or neglect to make them*. As, therefore, the lessor cannot refuse or neglect to make the repairs, until called upon to do so, it follows that the lessee who makes them without first calling upon his lessor, not only incurs the penalty of losing their cost, but he is also acting in violation of his contract—is in default—and what he does, he does at his own risk. Arts. 2691, 2151, 1906, 2445, 2216. So the proprietors will take upon themselves the risk of skill when they select the persons to do the work for which they have contracted with the undertakers. *LeDuff v. Porche*, 5 An. 148. It is a wise provision of law which requires the landlord to be notified before the tenant is permitted to make repairs. The owners of houses would soon be ruined if it were permitted to every tenant to make such repairs as his fancy or caprice might dictate, without notifying the owner of the property of his intentions. *Shall v. Banks*, 8 R. 171. Besides, as we have already intimated, the lessor cannot fulfill his obligation to keep the premises in a proper condition, unless informed by the lessee of the necessity of those occasional repairs of which the latter is alone cognizant. There is yet another reason which bears directly upon the circumstances of the present case. If the lessor be notified, he will then select workmen in whose skill and careful vigilance he can confide; he will choose agents whose character and responsibility are personally known to him, and the instinct of preservation will secure the employment of accountable and competent men. But of the exercise of this right *Mrs. Caldwell* has, by the illegal act of the defendants, been deprived. They chose one of their own workmen; a man without means, and unable to repair the mischief his gross negligence has caused. Now the duty of the defendants to notify *Mrs. Caldwell* was equivalent to an express stipulation to that effect, inserted in the contract; such stipulation being implied by law from the nature of the agreement. Art. 1757. And the violation of this duty was thus a violation of a stipulation of the contract. “Pour que le conducteur soit tenu de la perte ou de la détérioration de la chose louée, il n'est pas précisément nécessaire que ce soit sa faute qui ait proprement causé le dommage, il suffit qu'elle y ait donné occasion. * * * Ainsi s'il lui est défendu par le bail d'avoir aucune matière combustible dans aucun endroit, et qu'il y en ait eu, il sera tenu de l'incendie, quoique arrivé par cas fortuit; car c'est sa contravention aux clauses du bail, et par conséquent sa faute qui y a donné occasion. *Si in locatione convenit, ignem ne habeto, et habuit, tenebitur, etiamsi fortuitus casus admisit incendium*. L. 11, s. 1, ff. locat.

“Par la même raison si j'ai été attaqué en chemin par des voleurs qui ont tué le cheval que j'avais pris à loyer pour faire mon voyage, quoique cette violence, qui a causé la perte du cheval, soit une force majeure, dont le locataire n'est pas responsable, et que j'aie la preuve de cette violence par la capture des voleurs qui ont été pris peu après, néanmoins, si j'ai donné par ma faute occasion à cette accident en faisant route à des heures indues, ou en quittant le grand chemin pour en prendre un plus court mais beaucoup moins sur, je serai responsable de la perte du cheval.” Pothier, *Louage*, No. 194.

So in this case, the defendants violated a stipulation of their contract; that violation gave occasion to the fire, “et par conséquent, c'est sa faute qui y a donné occasion.” *Qui occasionem præstat damnum fecisse videtur*. L. 30, s. 30, D. ad leg. Aquil.

Our law upon the responsibilities of lessees is taken from the Roman law through the medium of the French. Let us refer to these sources. Pothier, *Louage*, No. 193, says: “Le locataire est tenu par rapport à la conservation

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de la chose qui lui a été louée, non seulement de sa propre faute, mais de celle de ces domestiques, c'est à dire, de sa femme, de ses enfans, de ses serviteurs et servantes, *des ouvriers qu'il fait travailler chez lui, &c.*"

Duranton, vol. 17, No. 103, commenting on art. 1785 Napoleon Code, from which art. 2692 of our Code is taken almost verbatim, says, "Et par *personnes de sa maison* l'on entend non seulement sa femme, ses enfans, les parens qu'il a reçus chez lui et ses domestiques des deux sexes, mais encore ses pensionnaires, ses hôtes, *les ouvriers qu'il fait travailler, &c.*"

Pothier, No. 194, loc. cit., says again in reference to accidents by fire :— "Comme les incendies arrivent ordinairement par la faute des personnes qui demeurent dans les maisons, lorsqu'une maison est incendiée, l'incendie est facilement présumé arrivé par la faute du locataire ou par celle de ces domestiques, desquels nous venons de dire qu'il est responsable."

This presumption of the Roman law, "*incendium fit plerumque culpâ inhabitantium*," L. 8, D. De officio præf. vigil; L. 11, D. De peric et commod. rei vendit. was incorporated into the old French law, and is formally sanctioned by the Code Napoleon, art. 1788, which imposes upon the lessee the burden of proving that the fire had occurred without fault upon his part. The reasons adduced for the adoption of this principle, are founded upon the most salutary wisdom. "*Ces règles sont sages, conservatrices de la propriété à laquelle le bailleur n'a aucun moyen de veiller* ; ces règles sont le gage le plus assuré de l'exactitude du preneur, du soin qu'il doit apporter dans l'usage de son droit ; de la surveillance qu'il doit exercer sur sa famille, et sur ses serviteurs. Au reste, la loi n'établit qu'une présomption. Cette présomption peut être détruite par une preuve contraire ; mais la présomption devait être établie contre le preneur, parceque, d'une part le bailleur n'a aucun moyen se prévenir ni d'éviter l'accident, et que de l'autre les incendies arrivent ordinairement par la faute de ceux qui habitent la maison."

Troplong, *Louage*, tome 2, p. 187. No. 864. Compare Duranton, tome 17, No. 104. Pothier, *Louage*, No. 198, ad finem. We would particularly call the attention of the Court to the authority of Troplong, who, No. 868, 865, has discussed this question with masterly ability, and has shown, as we think, unanswerably, that so far from being rigorous or exceptional in its character, the article of the French Code is in strict accordance with the analogies of law, and the provisions of the same Code upon kindred subjects, whilst in its conservatory regard for property and the public welfare, it exhibits a profound sagacity. Notwithstanding these reasons—notwithstanding the clear principle, that the lessee is a debtor and bound to restore the thing in the same condition in which he received it ; arts. 2689, 2690, 2697—notwithstanding the equally clear principle, that the debtor must prove the facts which exonerate him from the performance of his obligation ; arts. 2229, 2151, 2216—notwithstanding the rule of evidence which requires the plaintiff in all cases, to prove his allegations before he can recover ; and the defendants are plaintiffs in reconvention here—and notwithstanding that other rule of evidence, which places the burden of proof upon him who has to support his case by proof of a fact of which he is supposed to be most cognizant, our own Code, art. 2698, has, and as it appears to us, most unwisely, departed from the Roman and French law, and imposed upon the lessor the burden of proving that the fire arose from the fault of the lessee, or that of his family. In view of the reasons we have given, we submit that the Court should place this burden upon the lessor as lightly as may be, and that it should construe the article of our Code, not rigorously, but with a liberal regard to those considerations which prompted the adoption of a different rule in the French law, and which seem to us more consonant with reason and a sound public policy. The Judge, *a quo*, we respectfully insist, has erred greatly in the other extreme ; with fastidious niceness he would exact from us, who are the defendants in reconvention, an accuracy and fullness of proof that would scarcely be required from the plaintiffs in any action ; and he thought it our duty to make clearer a fact which, it seems to us, has been established beyond all reasonable doubt ; a fact, which we had no notice from the pleadings, or otherwise, that we should be required to show, until the moment of trial ; and a fact, which we were not bound to prove, if the other views we have presented upon the testimony of *Fairchild*, be correct.

The principle and authorities invoked by the defendants' counsel, pp. 6, 7, of his brief, have nothing to do with the question presented by the circumstances

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of this case. If defendants had no right to employ *Little*, they are liable for his acts. "The attorney is answerable for the person substituted by him to manage in his stead, if the procuration did not empower him to substitute;" Art. 2176. In the cases cited by the counsel, a tacit authority was given to one person to employ another exercising an independent calling.

Livingston, for defendant:

The Articles of the Civil Code having a bearing upon this case, are these: 2691—"The lessor is only liable for the injuries and losses sustained through his own fault;" 2693—"He can only be liable for the destruction occasioned by fire when it is proved that the same has happened, either by his own fault or neglect, or by that of his family."

Article 2663 requires the lessor to deliver the thing in good condition. He ought to make, during the continuance of the lease, all the repairs which may *accidentally* become necessary.

Article 2664 says: "If the lessor do not make the necessary repairs, the lessee *may* call on him to do it. If he refuse or neglect to make them, the lessee may cause them to be made." Article 2693: "A lessee is liable for his own acts of carelessness and for those of his servants." Domat, 470, says: "He who takes the thing to hire, is bound, not only for his own act, but likewise for the act of the person for whom he ought to be responsible; but if a tenant of a house has put in a tenant under him, or if he has kept servants in it, and by their carelessness have set the house on fire, the lessee is also accountable for the damage which may be occasioned by other faults, which any careful and diligent man would not readily fall into; but if, without his fault, the thing perishes, or is damaged by some accident, he is not bound to make it good. Domat, 469, Cushing's Edition.

Our law is the same, see Articles 2691 and 2693. Two questions now arise from the facts in this case:

First. Was *Little*, the copper-smith, (the one who was employed by defendants to repair the gutters,) the servant of defendants? and

Second. If not the servant, did defendants use that care which a prudent man would use?

Little was a copper-smith by trade, and had the character of being a good and careful workman? He exercised a *particular* trade, an *independent employment*. Broom, in his Legal Maxims, 583, Respondent Superior, after stating the liability of a master for the acts of his servants, says: "A difficulty, however, often arises in applying this general and fundamental rule to the particular facts of the case, and in determining between what parties the relationship of master and servant actually subsists; for although the party will usually be liable with whom the act complained of ultimately originates, yet the applicability of this fails in one case, for where he who does the injury exercises an *independent* employment, the party employing him is clearly not liable; as in the instance of a butcher who employs a driver whose deputy does the mischief by his careless driving, or of a builder, who contracts to make entire alterations in a club-house, together with the necessary gas-fittings, and who employs the gas-fitter for the latter purpose under a sub-contract, through the negligence of whom the plaintiff sustains an injury. In these cases the relation of master and servant does not subsist between the principal and the person who occasions the injury, and the former is, therefore, not liable for the misconduct of the latter. See case 12, *Adolph & Ellis*, 743, 40th vol. Com. Law Reports, 179; 6, *Meeson & Welsby*, 499; 9th, *Meeson & Welsby*, 709; *Quarman v. Burnett*.

Dunlap's Paley's Agency, 296; Lord Abinger, in commenting on the case where the injury was occasioned by the gas-fitter, says the injury was occasioned by *Bland*, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him, and to him the plaintiff must look for redress.

I think the true principle of law, consistent with common sense, was laid down in *Quarman v. Burnett*, in which all previous cases on this subject were cited and considered. Park B. observed: "The plaintiff has his remedy against *Bland*, whose negligence was the cause of the injury; if he attempts to go farther, and to fix defendant, it can only be on the ground of *Bland's* being the servant of defendant; but then, the obvious answer is, that *Bland* was only a sub-contractor to do certain work, and the relation of master and servant did not subsist between him and the defendants.

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Now, in the present case before the Court, it is evident that *Little*, the copper-smith, employed to repair the gutters, was not the servant of defendants—he exercised an independent calling—was skillful in his trade, and was just such a person as the plaintiff or any prudent person would have employed to do the same work. The Articles 2691 and 2693 of the Civil Code cannot apply to this case.

But, if the defendant had not called on plaintiff to repair the gutters, they would not be liable, for Article 2664 only contemplates that the lessor should pay the cost of repairs when he refuses, after being notified. He must be put in default.

The Article 2664 says the lessee *may* call, not shall call, and *may* cause, not shall cause, the repairs to be made. But if the lessee, of his own will, undertakes to repair what should be repaired by the lessor, the only penalty is that he must pay the cost of repairs. If the person employed to do the repairs is skillful or competent, and uses the same precautions that he or any one in his trade use, then the lessor is not liable, because he did what a prudent man would do, and because, further, he made such repairs only as the lessor should make. See 5 A. 713, *Hennen v. Hayden*; 5 A. 760, *Haynes v. Second Municipality*; 1 A. 13, *Baldwin v. Bank of Louisiana*; 17 La. R. 560, *Hyde v. Planters' Bank*; 5 A. 177, *Joor v. Sullivan*; 2 R. 294, *Frazier v. New Orleans Gas Light Co.*

SLIDELL, C. J. We are satisfied from the evidence that the fire occurred from the negligence of the workman employed by the defendants to repair a gutter on the roof of the house leased.

We are also of opinion that it was the duty of the lessees to call on the lessor to make the repairs for which the workman was employed, and that the lessees had no right to cause them to be made without such previous call, and the refusal or neglect of the lessor to make them. This seems to us the just conclusion from Articles 2663 and 2664 of the Code. We consider these provisions of law as wise in themselves, and involving an important right in favor of the landlord, which the lessee should not violate. Owners of houses might be serious sufferers, if it were permitted to tenants to make such repairs as their wishes might dictate, without notice to the owner. Moreover, if the lessor be notified he will then have an opportunity to select workmen in whose skill and carefulness he is willing to confide, and make his own bargain.

There being a duty resulting from the nature of the contract to give such notice, the defendants have acted in violation of it. It is in this violation of duty they have given occasion to the fire, and the fault of the workman whom they employed must be considered their fault, and they must answer for it.

We had some difference of opinion as to another item of the reconventional demand, namely, the claim made by the defendant for \$150, being the amount expended for a new floor, but a majority of the Judges are of opinion that it should be allowed, and deducted from the rent note, upon which suit is brought.

It is, therefore, decreed that the judgment of the District Court be reversed, and that the plaintiff recover from the defendants, *Thomas A. Snow* and *John McLean*, in *solido*, the sum of four hundred dollars, (being the amount of the note, less the sum of one hundred and fifty dollars, allowed to the defendants for laying a new floor,) with two dollars and fifty cents, cost of protest, and interest on four hundred dollars from 23d October, 1852, and costs in both Courts, and that upon the residue of the reconventional demand of the defendants, there be judgment in favor of the plaintiff.

JOHN S. DAVID & J. F. E. LIVAUDAIS v. MUNICIPALITY No. 2.

Livaudais v. Municipality No. 2, 16 La. 509. *Livaudais & David v. Same*, 5 Ann. 8. *Municipality No. 2 v. Palfrey and Xiques et al. v. Bujac et al.*, 7 Annual, affirmed.

A PPEAL from the Second District Court of New Orleans. *Lea, J. Soulé and Barton*, for plaintiff. *R. Hunt and T. R. Wolf*, for defendant and appellant.

BUCHANAN, J. This case is identical in principle with those of *Livaudais v. Municipality No. 2*, 16 L. R. 509; *Livaudais & David v. the same*, 5 Ann. R. 8; *Municipality No. 2 v. Palfrey*, 7 Ann. R.; *Xiques et al. v. Bujac et al.*, 7 Ann. R. The two last cases decided at the June term, 1852, and not yet reported.

For the reasons given by the Judge of the Court below, the judgment appealed from is affirmed, with costs in both Courts.

CHAUVIN & LEVOIS v. FRANÇOIS CHAIZ—Parish Recorder.

Plaintiffs bought at Sheriff's sale a plantation and slaves, on the 7th January, 1848. The Recorder certified that a mortgage, inscribed 18th October, 1848, existed on the property. Plaintiffs sued the Recorder to compel him to erase the mortgage so far as their property was concerned—and obtained judgment. *By the Court*—The judgment appears to us perfectly in conformity to the rights of the parties.

A PPEAL from the District Court, Fourth District, Parish of St. Charles, *Duffel, J. St. Paul*, for plaintiffs. *Forcelle*, for *Louis D'Arensburgh*, adm., appellant.

BUCHANAN, J. (VOORHIES, J., dissenting.) The plaintiffs having purchased a plantation and slaves on the 7th January, 1848, at a Sheriff's sale, made by the Sheriff of the parish of St. Charles, in execution of a judgment against one *Zenon D'Arensburgh*, complain that the defendant has improperly certified, as a mortgage upon said property, a judgment in favor of *Louis D'Arensburgh*, administrator, &c., v. *Zenon D'Arensburgh*, inscribed on the 18th October, 1848.

The present appeal is taken from a judgment ordering the erasure of the said judicial mortgage, so far as concerns the property of plaintiffs in the petition mentioned.

That judgment appears to us to be perfectly in conformity to the rights of the parties: and we must even express our surprise that this appeal has been taken, when we perceive that the party who takes it has disclaimed in his pleadings in the Court below, having authorized the Recorder to certify his judgment as a mortgage upon the property of plaintiffs.

It is proper to observe that the appellant was not subjected to costs of the suit by the judgment below, and the appellees submitted and submit to that portion of the judgment.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed; the costs of appeal to be paid by appellant.

VOORHIES, J. (dissenting.) On the 7th of January, 1848, the plaintiffs acquired the ownership of a certain plantation and slaves at a Sheriff's sale, made

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CHAIL. under an execution at the suit of the *Union Bank* against *Zenon D'Arensburyh*. At the date of the sale, there existed only two conventional mortgages on the property, one in favor of the seizing creditor, which had priority in rank, and the other in favor of *Widow Hurtubize*. After the Sheriff's sale, two judgments were obtained against the seized debtor, one in favor of *Widow Hurtubize*, recorded on the 21st of September, 1848, and the other in favor of the administrator of the estate of *Hubert D'Arensburyh*, recorded the 12th of October, 1848.

The plaintiffs instituted this suit for the purpose of compelling the Recorder to erase from his books the two judicial mortgages resulting from the recording of those judgments. It is alleged by the plaintiffs that, contrary to their expressed wish, the Recorder, in giving them a certificate of mortgage, had improperly embraced therein those two mortgages as bearing on their property, acquired under the Sheriff's sale of the 7th of January, 1848. The defendant admitted, in his answer, that he had reported in his certificate the mortgages of which the plaintiffs complained, but urged that he considered himself bound to do so, as the parties in interest had not authorized him to do otherwise. He disclaimed having any interest in the subject-matter in controversy, and prayed that the mortgagees be cited and made parties to the suit, to litigate their rights contradictorily with the plaintiffs.

It is unnecessary to notice the defence urged by *Widow Hurtubize* in the Court below, as she is not a party to this appeal.

The administrator of *Hubert D'Arensburyh's* estate excepted to the plaintiffs' right to call him in warranty, on various grounds—amongst others, that the certificate of mortgage, the basis of the suit, was delivered without his *knowledge, consent, or request*—that in mentioning the judicial mortgage existing in favor of the estate against *Zenon D'Arensburyh*, the Recorder should have mentioned it only as a general mortgage resulting from the recording of a certain judgment, and not as bearing on any particular property claimed by third persons.

There was judgment in favor of plaintiffs, decreeing that the judicial mortgage of the estate of *Hubert D'Arensburyh* be declared null and void, so far as it related to the property in question, and the Recorder enjoined from ever mentioning the same against said property.

The administrator is appellant from this judgment.

It appears to me from the pleadings in this case, that the plaintiffs have no right of action against the appellant. The cause of complaint or injury, if any existed, clearly originated with the Recorder in giving an improper certificate, as urged by the appellant. The Recorder, therefore, was alone responsible for the act, and not the appellant, who could have exercised no control over it. It is immaterial whether the defendant was exempted from the payment of costs, or not; it suffices that there existed no legal cause of action against him.

I am, therefore, of opinion that the judgment of the District Court should be reversed.

FELICITE PRIEUR, WIDOW R. LEMONIER v. J. N. DEPOUILLY, PATRICK
KIRWIN and M. J. BRENNAN.

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Where a contract of lease expressly excludes the right of sub-leasing, the premises cannot be leased without the consent of the lessor.

It is not necessary that the lessor should take any notice of the contract of sub-lease, or seek to interfere with it any further than it interferes with his rights.

Article 2696 of the Code prohibiting the lessee to sub-lease, is to be construed against the lessee.

Where the lessee sub-leases, without the lessor's consent, such sub-lease does not affect the lessor's right against his immediate lessee, and the lessor cannot be compelled to resort to an action to rescind the lease, and may exercise his privilege on the property in the leased premises.

A PPEAL from the Second District Court of New Orleans, *Lea, J. Bermudez*, for plaintiff. *Roselius*, for *Brenan*, appellant.

The following judgment was pronounced in the District Court, by

Lea, J. In this case the facts, as disclosed by the evidence, are correctly stated in the petition. On the 18th August, 1847, the plaintiff leased certain premises to *Rouen & Depouilly*, for the space of ten years, commencing on the 1st March, 1847, at an annual rent of \$720, payable in equal monthly instalments of \$60 per month. A special reservation was made in the lease, that no assignment or sub-lease should be made without the consent of the lessor. On the 23d May, 1849, an assignment, or transfer of the lease, was made with the consent of the lessor, to *J. P. Kirwin*, who assumed all the obligations in said lease contained, and promised to comply with all its clauses, conditions and stipulations. *J. N. Depouilly* bound himself as surety, in *solido*, for *Kirwin*, for the payment of the rent and the fulfillment of the other obligations. In other words, *Kirwin* was considered as standing in the shoes of the former lessees. On the 22d May, 1852, *Kirwin* transferred the lease to *M. J. Brennan*, without the consent of the lessor, and this suit is brought for the rent alleged to be due and to become due, on the ground that *Kirwin* was removing part of the effects on which the lessor had a privilege, and for the cancellation of the sale and transfer of the lease to *Brenan*. *Kirwin* and *Depouilly*, for answer, allege that they have no interest as defendants, the lease having been transferred to *Brenan*, who, for answer, pleads the general denial, alleging that he has paid the rent as it fell due, with the exception of that due for the last month prior to the institution of the suit, which rent was tendered by respondent and refused.

It appears to me that, considering the testimony of *T. W. Collins* and *A. Prieur*, the plaintiff was justified in obtaining the seizure of the property, and to such a judgment as is contemplated in proceedings had under the Act of 1839, p. 172.

The next question to be determined is, whether *Kirwin* had a right to substitute *Brenan* as a tenant in his place, without the consent of the lessor. It appears to me that the terms of the contract expressly excluded any such right, and forbid the transfer.

It is not a sufficient answer to say that the lessor has nothing to do with the contract between *Kirwin* and *Brenan*, and cannot, therefore, sue for its rescission. It is not necessary that the lessor should take any notice of the contract, or seek to interfere with it any further than it interferes with her rights; but she has a right to the enforcement of her own contract, according to its terms. Under that contract she reserved the right to choose her own tenant, and this

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DEPOUILLY ET AL. right, though it may be exercised injuriously at times, is nevertheless very often essential to the preservation of property.

It is suggested that, according to the concluding clause of Article 2696, the prohibition to sub-lease, or transfer the lease, should be construed strictly against the lessor. The interpretation given to this clause by the Supreme Court, is directly the reverse of this. See 4th Annual, page 40. It appears to me that, under the contract, the plaintiff has a right to insist that *Brenan* shall cease to be her tenant, and that the transfer, so far as it affects her rights as lessor, be set aside; and further, that she has the right to enforce the contract with *Kirwin*, and that she cannot be compelled to resort to an action for the rescission or annulment of the lease.

I have not thought proper to notice the fact referred to by one of the counsel, viz: that *Kirwin* has made a surrender of his property. No such fact is set forth in the pleading, or shown by the evidence.

The Court having duly considered this case, for the reasons assigned in the written opinion this day delivered and on file, it is ordered, adjudged and decreed that the plaintiff, *Félicité Prieur*, have and recover against the defendants, *J. P. Kirwin* and *J. N. Depouilly*, in *solido*, for the sum of one hundred and eighty dollars for rent now due, with interest thereon, at the rate of five per cent. per annum on sixty dollars thereof from the 1st day of November, 1852, till paid; and on sixty dollars thereof from the 1st day of December, 1852, till paid; and on sixty dollars thereof from the 1st day of January, 1853, till paid; and for the further sum of three thousand dollars, payable in monthly instalments of sixty dollars each, commencing on the 1st day of February, 1853, and ending on the 1st day of March, 1857, with costs of suit, the whole with the privilege of lessor upon the property sequestered herein, with leave to said plaintiff to take out execution therein, from time to time, as said instalments shall respectively fall due.

It is further ordered that the transfer of the lease from *Kirwin* to *Michael J. Brennan* be avoided and set aside, so far as it affects the rights of the plaintiff herein, and that said plaintiff have judgment, decreeing that said *Brenan* be, and is not entitled to occupy said premises as tenant or sub-lessee of said *Kirwin*, or as holding said premises in virtue of any transfer from said *Kirwin*.

SLIDELL, C. J.* The reasons given by the District Judge for his judgment appear to us satisfactory.

As to the tender said to have been made by *Brenan*, the lessor had a right to disregard it, *Brenan* not being her tenant.

Judgment affirmed, with costs.

* CAMPBELL, J., absent.

L. J. SIGUR v. W. H. CRENSHAW.

The Constitution of 1845 was superseded and not amended by the Constitution of 1852. (SLIDELL, C. J.)

The Article 144 of the Constitution of 1852 was framed in order to prevent the *interregnum* that would otherwise occur from the displacement of the old government and the organization of the new. (SLIDELL, C. J.)

It was not intended by the Constitution of 1852 that the old incumbents of office were to hold until the expiration of their respective terms, but only until their successors were appointed. (SLIDELL, C. J.)

When the people in the exercise of their sovereignty, deliberately put an end to the existing constitution, and adopt an entirely new one in its stead—all powers of government under the old constitution, necessarily cease, except in so far as they are maintained in existence by the new constitution. No one has such a vested right to office as to resist the necessary consequence of an entire abrogation, by the people, of the constitution, under the authority of which he holds it. Rights to property and the obligation of contracts stand on a different footing, and I do not understand art. 143 of the constitution as applicable to the right to an office. (OGDEN, J.)

The Constitution of 1852 was intended as an abrogation of the constitution of 1845—and not merely as a change in some respects of an existing State government. (OGDEN, J.)

Under the constitution of 1852 the Governor had the power, with the advice and consent of the Senate, to appoint a new Register of the Land Office, and on such appointment the right of the incumbent ceased. (OGDEN, J.)

I feel bound to construe the two articles, 143 and 144 of the constitution of 1852, in such a manner as to give effect to both—if that be possible. The conclusion to which that rule of construction has led my mind is, that the appointing power of the government, organized under the constitution of 1852, is to be exercised with reference to pre-existing laws—and to rights acquired by individuals under pre-existing laws—in all cases where such laws and such rights are not inconsistent with the constitution itself. (BUCHANAN, J., dissenting.)

The sanctions of the law—the rights of persons were only disturbed by the constitution of 1852, in those cases and to that extent that the constitution contained declarations inconsistent with particular statutes and particular rights. (BUCHANAN, J., dissenting.)

The Register of the Land Office having been appointed to office under an Act of the Legislature which fixed the tenure "at two years, unless removed in due course of law—and unless all said lands shall be sold before that time, when it shall be in the power of the Governor to discontinue the office"—and the limitation specified in the Act not having occurred—the constitution of 1852 gave to the executive no authority to supersede him. (BUCHANAN, J., dissenting.)

A PPEAL from the District Court, Sixth District, *Robertson, J. Sigur*, in *pro. per. Davidson & McHatton* and *J. M. & J. E. Elam*, for respondent and appellant.

Sigur—Brief for the relator and appellee.

The respondent and appellant, *W. H. Crenshaw*, was appointed Register of the Land Office at Baton Rouge on the 9th November, 1851, during the recess of the Senate, to fill the unexpired term of *Loucks*. This recess nomination was confirmed by the Senate on the 2d day of February, 1852. On the 14th of the same month and year, he was again nominated by the Governor and confirmed by the Senate, for the full term of two years.

He furnished the required bond and took the oath of office on the 16th day of March, 1852.

The relator, *L. J. Sigur*, was nominated by the present Governor of the State and confirmed by the Senate on the 31st day of March, 1853, Register of the Land Office at Baton Rouge, for two years, commencing on the 31st of March, 1853, the date of his commission. He took the oath of office, required by article 90 of the Constitution of 1852, and furnished the legal bond and security on the 2d day of April, 1853.

W. H. Crenshaw having refused to vacate the office and to deliver the papers, books, charts, maps, &c., appertaining to it, to the relator, the latter sued out a mandamus to compel him to do so. From the judgment of the Court, making this mandamus peremptory, *Crenshaw* has appealed.

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The facts, as stated above, are not disputed. The only question of any difficulty raised by the pleadings, the only one which I feel myself called upon to discuss is: "Had the term of office of *Crenshaw* expired when the Governor appointed *L. J. Sigur* to succeed him?" For if it had expired, then a case—an occasion—for the legitimate exercise of the appointing power, vested in the Executive by the Act of 1844, and by the new constitution, had occurred; and it was not only the right, but it became the duty of the Governor to fill the vacancy.

It is a universally admitted principle—a principle of the Constitutional common law of the land—that our State governments are founded in, and maintained by the will and authority of the people, by whom they have been established. The written charters or constitutions which embody that will, and have been sanctioned by that authority, are the basis, the immediate "*Rationes Essendi*," to use a barbarous expression of scholastic philosophy, of these governments. They have no original life, no continuous vitality from any other source. The different departments into which they are divided—the Executive, Legislative and Judicial, and the acts and creations of these derive their existence and powers, their force and effect from, and are sustained, either mediately or immediately, directly or indirectly, by these constitutions which first called them into being, organized them, and set them in motion. In short, to use the language of the civil, instead of the political law, these governments are moral entities, bodies politic, great corporations—the archetypes of all corporations—formed by the people for certain purposes, having no being out of the charters by which they are created, and therefore incapable of surviving them. See Vattel, Preliminaries, sec. 1 and 2; Ib. B. 1, chap. 1, sec. 1; Angel and Ames, Introduction, p. 10, sec. 4.

It follows from these premises that as soon as the constitution of a State—the basis and sustaining power, the charter of incorporation of the moral entity called "government"—is abrogated, superseded, made void, the entire edifice reared upon it must tumble to the ground, the fictitious ideal being, once "incorporated" by it, must again dissolve into its original nothingness, and all the rights, powers and immunities with which it was vested, revert to the grantors. A state of anarchy ensues, laws have no force, actions and rights are paralyzed, officers no longer exist, the terms of all officers expire.

Such, or analogous, were the consequences of the dissolution of corporations at common law—consequences flowing from the very nature and character, from the very definition and conception of corporations. See Angel and Ames, chap. 22, sec. 6, p. 750. The uniform practice of all the Conventions which have from time to time assembled in the different States, from the earliest period of our national existence down to our day, to adopt a constitution or to remodel and recast the existing one, attests that in their opinion, at least, and as far as the effects of their dissolution is concerned, there is no difference between these great archetypes of all corporations—governments or States, for they are synonymous—and ordinary corporations. With one or two exceptions, which will be explained in their proper places, the utmost care and industry were used by these Conventions to provide against the state of anarchy which, it was assumed and in most cases proclaimed, would ensue upon the supersession of the old constitution or form of government, and would continue until the new one was thoroughly organized. Temporary governments, under the significant head of "schedules," were established as receptacles of the powers, rights and duties of the sovereignty, until these powers, rights and duties could be definitely transferred to and exercised by the new corporation, and every necessary measure was prescribed to facilitate and even hasten the change. A rapid survey of the constitutions of the different States, or of such of their provisions as relate to this subject will show:

1. The universal admission of the proposition contended for above.
2. That the principle once adopted, its application must be general, and can admit of no exception.
3. The language used will serve to throw light upon article 144 of our own constitution, upon which the decision of this case must turn.

The State of Maine was formed out of a district of Massachusetts. It became independent of that State in 1820, and adopted its constitution in the same year. The following provisions are to be found in the schedule of her constitution:

"4. All laws now in force in this State and not repugnant to this constitution, shall remain and be in force until altered or repealed by the Legislature, or shall expire by their own limitation."

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"5. All officers provided for in the sixth section of an Act of the Commonwealth of Massachusetts, passed on the nineteenth day of June, in the year of our Lord one thousand eight hundred and nineteen, entitled an 'Act relating to the separation of the district of Maine from Massachusetts proper, and forming the same into a separate and independent State,' shall continue in office as therein provided, and the following provisions of said act, &c., &c."

The sixth section of the Act here referred to, provides that "all officers who shall on the said 15th day of March next (the day on which the separation was to take place,) hold commissions or exercise any authority within said district of Maine, under the Commonwealth of Massachusetts or by virtue of the laws thereof, excepting only the Governor, Lieutenant Governor and Council, the members of the Legislature and Justices of the Supreme Judicial Court of the said Commonwealth of Massachusetts, shall continue to have and to hold, use, exercise and enjoy, all the powers and authority to them respectively granted or committed, until other persons shall be appointed in their stead or until their respective offices shall be annulled by the Government of the said proposed State."

The Constitution of New Hampshire, under the head of "Oath and subscription, exclusion from, &c. &c.," from similar views and for like objects, contains the following provisions:

"All laws which have heretofore been adopted, used and approved in the Colony, Province, or State of New Hampshire, and usually practised on in Courts of law, shall remain and be in full force until altered or repealed by the Legislature," &c.

"To the end that there may be no failure of justice or danger to the State, by the alteration and amendments made in this Constitution, the General Court is hereby fully authorized and directed to fix the time when the said alterations and amendments shall take effect and make the necessary arrangements accordingly."

The present Constitution of Vermont was adopted in 1793, and only amended in 1828. Her first constitution was framed in 1777. No provisions of the character of those already quoted from the constitutions of Maine and New Hampshire are to be found in the constitutions of Vermont as they are given to the public in the collection of "American Constitutions," and I have not been able to procure the statutes of that State to ascertain whether such provisions had been made, but were omitted in the collection referred to, as in other instances, on account of their temporary character. The political history of Vermont is, at any rate, rather eccentric. She continued to be governed by an unwritten constitution until one year after the declaration of independence.

The present constitution of Massachusetts was adopted in 1780; it has since received several amendments. It contains the following provisions:

Chap. vi. sec. 6. "All laws which have heretofore been adopted, used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practiced on in the Courts of law, shall still remain and be in full force, until altered or repealed by the Legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

Sec. 9. "To the end that there may be no failure of justice, or danger arise to the commonwealth from a change of the form of government, all officers, civil and military, holding commissions under the government and people of Massachusetts Bay, in New England, and all other officers of said government and people, at the time this constitution shall take effect, shall have, hold, use, exercise and enjoy all the powers and authority to them granted or committed, until other persons shall be appointed in their stead, and all Courts of law shall proceed in the execution of the business of their respective departments, and all the executive and legislative officers, bodies and powers, shall continue in full force, in the enjoyment and exercise of all their trusts, employments and authority until the General Court and the Supreme and Executive officers, under this constitution, are so designated and invested with their respective trusts, powers and authority."

The Constitution of Rhode Island provides, art. xiv., sec. 1, that "All civil and military officers now elected, or who shall hereafter be elected by the General Assembly, or other competent authority, before the said first Wednesday

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of April, shall hold their offices and may exercise their powers until the said first Wednesday of May, or until their successors shall be qualified to act. All statutes, public and private, not repugnant to this constitution, shall continue in force until they expire by their own limitation, or are repealed by the General Assembly. All charters, contracts, actions and rights of action, shall be as valid as if this constitution had not been made. The present government shall exercise all the powers with which it is now clothed until the said first Tuesday of May, 1843, until the government, under this constitution, is duly organized."

The Constitution of Connecticut, article x, 8, provides that "The rights and duties of all corporations shall remain as if this constitution had not been adopted, with the exception of such regulations and restrictions as are contained in this constitution. All judicial and civil officers, now in office, who have been appointed by the General Assembly and commissioned according to law, and all such officers as shall be appointed by the said Assembly, and commissioned as aforesaid, before the first Wednesday of May next, shall continue to hold their offices until the first day of June next, unless they shall, before that time, resign or be removed from office, according to law. The Treasurer and Secretary shall continue in office until a Treasurer and Secretary shall be appointed under this constitution. All military officers shall continue to hold and exercise their respective offices until they shall resign or be removed, according to law. All laws, not contrary to or inconsistent with the provisions of this constitution, shall remain in force until they shall expire by their own limitation, or shall be altered, or repealed by the General Assembly, in pursuance of this constitution. The validity of all bonds, debts and contracts, as well of individuals as of bodies, corporations," &c. &c.

Similar provisions and arrangements, to facilitate the passage from the old to the new constitution, and to prevent an interregnum, may be found in article i, sec. 17, and article xiv, sec. 1, et seq. of the Constitution of New York.

The Constitution of New Jersey, article x, sec. 1 and 2, provides that "the common law and the statute law, now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation or are altered or repealed by the Legislature, and all writs, actions, causes of said actions, prosecutions, contracts, claims, or rights of individuals, and of bodies corporate and of the State, and all charters of incorporations, shall continue, and all indictments which shall have been found for any crime or offence committed before the adoption of this constitution, may be proceeded upon as if no change had taken place. The several Courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdictions as if this constitution had not been adopted.

2. "All officers now filling any office or appointment shall continue in the exercise of the duties thereof according to their respective commissions or appointments, unless by this constitution it is otherwise directed."

The following are the provisions of the constitution of Pennsylvania :

SCHEDULE.

"That no inconvenience may arise from the alterations and amendments in the constitution of this Commonwealth, and in order to carry the same into complete operation, it is hereby declared and ordained, that :

"1. All laws of this Commonwealth, in force at the time when the said alterations and amendments in the said constitution shall take effect, and not inconsistent therewith, and all rights, prosecutions, actions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if the said alterations and amendments had not been made.

"2. The appointing power shall remain as heretofore, and all officers in appointment of the executive department shall continue in the exercise of the duties of their respective offices until the Legislature shall pass such laws as may be required by the eighth section of the sixth article of the amended constitution, and until appointments shall be made under such laws; unless their commissions shall be superseded by new appointments, or shall sooner expire by their own limitations, or the said offices shall become vacant by death or resignation, and such laws shall be enacted by the first Legislature under the amended constitution."

The Constitution of Delaware contains the following provisions :

"ARTICLE VII.—SEC. 9.

"All the laws of this State, existing at the time of making this constitution, and not inconsistent with it, shall remain in full force, unless they shall be altered by future laws; and all actions and prosecutions now pending, shall proceed as if this constitution had not been made.

"SCHEDULE, SEC. 10.

"The Acts of the General Assembly, increasing the number of Justices of the Peace, shall remain in full force until repealed by the General Assembly; and no office shall be vacated by the amendments to this constitution, unless the same be expressly vacated hereby, or vacating the same is necessary to give effect to the amendments."

I find the following provision in the constitution of Virginia of 1830. I have not been able to get a copy of the present constitution of that State, or of the ordinance by which the constitution of 1830 was organized. But the following, even though from a superseded constitution, will serve equally well to illustrate the principle, and support the conclusions which I am endeavoring to establish :

"ARTICLE VII.

"The Executive department of the government shall remain as at present organized, and the Governor and privy counsellors shall continue in office until a Governor, elected under this constitution, shall come into office; and all other persons in office when this constitution shall be adopted, except as herein otherwise expressly directed, shall continue in office till their successors shall be appointed, or the law shall otherwise provide; and all the Courts of justice now existing, shall continue with their present jurisdiction, until and except so far as the judicial system may or shall be hereafter otherwise organized by the Legislature."

No provisions of a similar character to those quoted above are to be found in the constitutions of North and South Carolina, the first adopted in 1775, the second in 1790, and continued to our day with only a few amendments. They were not necessary, as these constitutions were adopted by the Legislatures of those States, which could make the proper arrangements to carry them into effect. The Legislatures of these States still continue to possess the power of amending their respective constitutions. Const. of North Carolina, article iv, sec. 2. Const. of South Carolina, article xi.

The first constitution of Georgia was framed in 1777, the second in 1785, and the present one in 1798; it was amended in 1839. It contains the following provisions :

"14. All civil officers shall continue in the exercise of the duties of their several offices, during the periods for which they were appointed, or until they shall be suspended by appointments made in conformity to this constitution; and all laws now in force shall continue to operate, so far as they are compatible with this constitution, until repealed, and it shall be the duty of the General Assembly to pass all necessary laws and regulations for carrying this constitution into full effect."

The Constitution of Indiana provides :

ARTICLE IV.—SEC. 14.

"SEC. 1. That no evils or inconvenience may arise from the change of a territorial government to a permanent State government, it is declared by this constitution, that all rights, suits, actions, prosecutions, recognizances, contracts and claims, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government,

"2. All fines, penalties and forfeitures, due and owing to the territory of Indiana, or any county therein, shall inure to the use of the State or county. All bonds executed to the Governor, or any other officer, in his official capacity, in the territory, shall pass over to the Governor or other officers of the State or county, and their successors in office, for the use of the State or county, or by him or them to be respectively assigned over to the use of those concerned, as the case may be.

"3. The Governor, Secretary, and Judges, and all other officers, civil and military, under the territorial government, shall continue in the exercise of the

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duties of their respective departments, until the said officers are superseded under the authority of this constitution.

"4. All laws and parts of laws, now in force in this territory, not inconsistent with this constitution, shall continue and remain in full force and effect, until they expire, or be repealed."

The Constitution of Wisconsin provides :

"ARTICLE XIV.—*Schedule.*

"SEC. 1. That no inconvenience may arise by reason of a change from a territorial to a permanent State government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no such change had taken place, and all process which may be issued under the authority of the territory of Wisconsin, previous to its admission into the Union of the United States, shall be as valid as if issued in the name of the State.

"2. All laws now in force in the territory of Wisconsin, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the Legislature.

"3. All fines, penalties, or forfeitures accruing to the territory of Wisconsin, shall enure to the use of the State.

"5. All officers, civil and military, now holding their offices under the authority of the United States, or of the territory of Wisconsin, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the State."

The Constitution of Iowa was adopted in 1846. It contains the following provisions :

"ARTICLE 12, *Schedule.*

"SEC. 1. That no inconvenience may arise from a change of territorial government to a permanent State government, it is declared that all writs, actions, prosecutions, contracts, claims or rights, shall continue as if no change had taken place in this government, and all processes which may, before the organization of the judicial department under this constitution, be issued under the authority of the territory of Iowa, shall be valid as if issued in the name of the State.

"SEC. 2. All laws now in force in this territory, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the General Assembly of this State.

"SEC. 5. All officers, civil and military, now holding offices and appointments in this territory, under the authority of the United States, or under the authority of this territory, shall continue to hold and execute their respective offices and appointments until superseded under this constitution. See Code of Iowa."

The very same provisions may be found in the schedule of the constitution of Arkansas, with these slight differences, that in Sec. 5, which relates to the officers, the words "holding commissions" are used, instead of the words "holding offices and appointment," employed in the constitution of Iowa. See Revised Statutes of Arkansas.

The provisions of the Constitution of Alabama are also similar, with the exception of the article continuing the officers in office. It reads thus :

"SEC. 4. All officers, civil and military, now holding commissions under the authority of the United States or of the territory of Alabama, within this State, shall continue to hold and exercise their respective offices, under the authority of this State, until they shall be superseded under the authority of this constitution, and shall receive from the treasury of this State the same compensation which they heretofore received, in proportion to the time they shall be so employed. The Governor shall have power to fill vacancies by commissions to expire as soon as elections or appointments can be made to such offices, by authority of this constitution." See Code of Alabama.

The same provisions, in the same words, are to be found in the constitution of Missouri. The provision for the salary of the officers continued in office, is the same as in the constitution of Alabama.

The constitution of Ohio, of 1802, its first constitution contains, substantially, the same provisions. The present constitution, adopted in 1852, repeats them. The 5th Sec. however, is different, and deserves attention. It is in these words :

"The Register and Receiver of the Land Office, Directors of the Penitentiary, Directors of the Benevolent Institutions of the State, the State Librarian and all other officers not otherwise provided for in this constitution, in office on the first day of September, 1851, (the day on which the constitution, if adopted, was to be proclaimed,) shall continue in office until their terms expire respectively, unless the General Assembly shall otherwise provide." See Statutes of Ohio.

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The schedule of the present Constitution of Mississippi is very much the same as those of Alabama, Missouri, and Louisiana. The provision regarding the officers of the State runs thus :

"Sec. 3. The Governor and all officers, civil and military, now holding commissions under the authority of this State, shall continue to hold and exercise their respective offices until they shall be superseded, pursuant to the provisions of their constitution, and until their successors are duly qualified." See Laws of Mississippi.

The schedule of the Constitution of Tennessee, adopted in 1834, besides the usual provisions relative to the laws, contains the following: "That no inconvenience may arise from a change of the constitution, it is declared, that all officers, civil and military, shall continue to hold their offices, and all the functions appertaining to the same shall be exercised and performed according to the existing laws and constitution, until the end of the first session of the General Assembly which shall sit under this constitution, and until the government can be organized in such manner as the first General Assembly shall prescribe and no longer."

The schedule of the Constitution of Kentucky is substantially the same as the above, with the exception of the fifth section, which is explicit and deserves to be cited :

"That all officers now filling any office or appointment shall continue in the exercise of the duties of their respective offices or appointments, for the terms therein expressed, unless by this constitution it is otherwise directed."

The schedule of the constitution of Texas contains the usual provisions concerning the laws. The section which continues the officers in office is in these words :

Sec. 10. That no inconvenience may result from the change of Government, it is declared that the laws of this Republic relative to the duties of the officers, both civil and military of the same, shall remain in full force, and the duties of their several offices shall be performed according to existing laws, until the organization of the Government of the State under this Constitution, or until the first day of the meeting of the Legislature; that then the offices of President, Vice-President, of the President's Cabinet, Foreign Ministers, Charges and Agents and others, repugnant to this Constitution, shall be superseded by the same, and that all others shall be holden and exercised until they expire by their own limitation or be superseded by the authority of this Constitution or laws made in pursuance thereof."

The schedule of the Constitution of Florida is like that of the Constitution of Alabama. See Thompson's Digest Laws of Florida.

The provisions of the schedule of the Constitution of California, with regard to officers, is pretty much, if my memory serves me, the same as that of the Constitution of Louisiana.

Besides the provisions quoted above, these Constitutions contain other and more minute arrangements to facilitate the organization of the new Government, such as the transfer of the records, suits, &c., from the old to the new Courts.

I have placed the Constitutions of the different States under the eyes of the Court, to show the universal understanding that the adoption of a new form of Government or Constitution supersedes, avoids, displaces, destroys the old in every and in all its parts; that the laws in force under that superseded Constitution, if continued in effect, derive their validity from the new Constitution which continued them, and not from the old, under which they originated; that the officers of the old Government are functi officio, and if continued in office by a provision of the new organic law, they hold under that provision and not under their first appointment. For what would be the object of these provisions, why the fear of the "inconveniences" so carefully guarded against, if these laws, enacted by the former Government, retained their force, and the appointments made, continued valid? The principle acted upon by these conventions has many analogies in other systems of law. For instance, the King of

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England is a corporation sole. He is the fountain of patronage and of honor. Therefore at his death all offices become vacant. An act was passed in the sixth year of Queen Anne, "to remedy the inconvenience," but this act applied only to certain offices and not to the judges. Accordingly it was held that their offices were determined on the demise of the King, although the act of the thirteenth year of William III had provided that their commissions would be "quamdiu bene sese gesserint." Further to secure their independence it was enacted in the first year of George III, that the demise of the King should no longer have that effect.

Another object which I have had in view has been to show practically the distinction carefully preserved between the law creating the offices, prescribing the duties and defining their terms, and the officers filling those offices. For the laws creating the offices are not only continued, but distinct provisions are made continuing the then acting officers, in most of the Constitutions, until they are superseded under the new organization, and in two or three instances for the full term of their original appointments. But in these latter cases the most explicit and unequivocal language is used, such as "shall continue according to their respective commissions or appointments," or "until their commissions expire," or "for the term for which they have been appointed." All officers, without any distinction, whether of Legislative or Constitutional creation, whether elective or appointed by the Executive, are included in these provisions. The general principle which made it necessary to continue one class of officers applied equally to all the others. The most petty officer, as well as the most significant and important, must have fallen with the Government of which he was a part; he could not claim to exercise his duties under the new Government, because he was not of it, had not received his appointment from it, did not qualify under it, and for aught that can be known, did not possess the qualifications required by it.

And this leads me to the main object of these references, namely, to show the character, objects and purposes of these provisions or schedules. "The representatives of the people of Louisiana," says Judge Matthews, in the case of *Bermudez v. Ibanez*, Martin's Rep. O. S. p. 3, "met for the purpose of laying the foundation of a State Government, the establishing a permanent Constitution, and the providing for a temporary Government. As in Representative Governments considerable time is necessary to effect a change, it becomes necessary, in order to avoid anarchy, to create a kind of intermediate Government, the duration of which expires when the permanent Government is organized and goes into operation. These two governments are distinct and separate; they are to succeed the one to the other; they cannot be blended in whole or in part.

"This being understood, it is next to be considered how the judiciary power of that temporary government was regulated by the schedule.

"The Convention, desirous of avoiding the inconvenience which might arise from a change of Government, declared "That the Governor, Secretary, Judges, and all other officers under the Territorial Government should continue in the exercise of the duties of their respective departments until they should be superseded under the authority of the Constitution.

"The intention of the Convention, clearly manifested by the expression of the schedule, was for the time to maintain the order of things which existed *until then*, as if no change has existed."

And in the case of *Massicot v. Dufau*, *ibid*, p. 291, the same Judge says: "It has already been said in *Bermudez v. Ibanez*, that the permanent Government to be established under our Constitution, and the temporary administration provided for by the schedule annexed to that Constitution were separate and unconnected. All the provisions of the Constitution were applicable to the Government to be organized under it, none of them to the temporary Government. The express object of the schedule was to maintain the order of things then existing, as if no change had taken place, until the permanent Government could be organized. This organization was not the work of a day, as some persons may have fancied. It was to take place by degrees; the Legislature was first created; then the Executive; then the Judiciary. In each branch of the Government the Constitution could not go into operation before the late authorities were superseded by those of new creation. Any other construction of the Constitution and schedule would make their dispositions contradictory and

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confused." The most cursory examination of the schedules of the different Constitutions will show that their character and purposes are such as *Judge Matthews* defines them—temporary Governments, having a separate and distinct existence from the new and the old—intended to serve a temporary purpose—and nothing more. Nor is there any distinction made, as indeed there is no legal difference between cases of changes from the territorial State to the condition of State sovereignty, and changes from one form of State sovereignty to another form of State sovereignty. In the first, as in the latter case, one Government is distinct and separate from the other—it is a different entity. The Government of the State of Louisiana, under the Constitution of 1852, is as distinct and different, according to the principles of legal science, from the Government of 1845, as that Government was distinct and different from the territorial Government. This Court could not entertain suits commenced before its predecessors, or appeals from the inferior Courts of the Constitution of 1845—these very inferior Courts themselves, under the present Constitution, could not try suits commenced before their predecessors, of the Constitution of 1845—were it not for the law of the Legislature, enacted in pursuance of Article 146 of the present Constitution. The officers of the Constitution of 1845 are not the officers of the Constitution of 1852, and as long as the former continue in office, the present Government will remain *pro tanto* unorganized. Governor Walker succeeded Governor Johnson; the acts of the former were the acts of the latter in the contemplation of law. But the present Governor of the State did not succeed to Governor Walker; he was the creature of a distinct and different creator; the acts of the former did not bind the latter, he received nothing from him, he had nothing to yield. He exercises his constitutional rights in their entirety.

Arguing from these principles, which are assumed by the Constitutions I have reviewed, is not the conclusion irresistible, unless contradicted by the most positive and explicit language, that these temporary "officers" are only tenants at will, to be removed as soon as the particular department under whose control they fall, is ready to exercise its constitutional functions? Is it not obvious that to continue them longer, would be to continue the disorganization of the Government, or at least to prolong, without cause, the temporary Government? That such could not have been the desire of the framers of our Constitution, is apparent from the care which they took to provide for that organization in all the departments of the Government, and especially in the Executive. That Constitution contains a provision which is not to be found in other Constitutions, and which, in strictness, would not be necessary to enable the Governor to exercise the appointing power in this and similar cases. But its presence, especially in the schedule, can be explained only on the ground that the convention desired and directed that he should exercise the powers conferred upon him, to organize his department; as they had directed the Legislature to organize the other branches of the Government. See Article 145, Constitution of 1852. That Constitution, Article 90, requires that "members of the General Assembly and all officers, before they enter upon the duties of their offices, shall take the following oath or affirmation: "I do solemnly swear or affirm that I will support the Constitution of the United States, and of this State." What Constitution? Clearly, the present Constitution. Is the respondent an officer of this State? Are all the officers who still hold over under the schedule? Certainly not; they are officers of the "State" or Government of 1845, not of the State or Government of 1852; and as long as they continue under their original appointment they are not "qualified officers" of the present Government, they are an anomaly in it, living antinomies, staring the plain text of the Constitution in the face.

Assuming then the principle to be established beyond reasonable ground of controversy, that but for the saving clauses of the schedule annexed to the Constitution, all laws passed under the superseded Constitution, as well as all offices created and all officers appointed under it, would have fallen with it; let us proceed to examine to what extent these saving clauses continue the pre-existing state of things.

It is extraordinary that any doubt should be created as to the proper interpretation to be given to the Article of the Constitution in which these saving clauses are found. Language more simple and intelligible could scarcely have been framed to give expression to the dominant idea of that Article.

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"In order that no *inconvenience* may result to the public service from the taking effect of this Constitution, no office shall be superseded thereby; but the laws of the State relative to the duties of the several offices, Executive, Judicial and Military, shall remain in full force, though the same be contrary to this Constitution, and the usual duties shall be performed by the respective officers of the State, according to existing laws, until the organization of the Government under this Constitution, and the entering into office of the new officers to be appointed under said Government, and *no longer*." Art. 144.

The convenience of the public service is here plainly set forth as the controlling motive for the temporary continuance in office of all officers appointed under the prior Government. Now the inconvenience which would have resulted to the public service from the omission of such a clause is too obvious to require comment. The Constitution did not appoint a Governor, nor did it elect a Legislature or nominate Judges. It simply provided the means for their creation. It was absolutely necessary, therefore, that until this machinery of the new Government could be set in actual motion, the old officers should continue in the exercise of their functions, *but no longer*. As soon as the Executive or appointing power was placed in a condition to act, and to supersede by new appointments the incumbents who held under the former government, the convenience of the public service no longer required the continuance of these latter in office. Then the temporary consideration which had prolonged their existence beyond the life of the power which created them, having been answered, they naturally followed the fate of that power to which they owed their being.

This view of the meaning of Article 144, derived from the consideration of the motive which is spread upon its face, is amply confirmed by an examination of the details of the Article.

Provision is made first for the *offices* that they shall not be superseded. Secondly, for the *duties* of those offices, that they shall in no wise be modified, abridged or altered, even though contrary to the Constitution; and thirdly, for the officers themselves, that their offices shall be filled, and their duties performed by the existing officers of the State *until* (observe the adverb of limitation) the organization of the new Government, and the *entering into office of the new officers* to be appointed under said Government, and *no longer*.

Then the old officers were to continue in office, notwithstanding the adoption of the new Constitution. But how long? The Constitution itself answers the question—*until* the organization of the new Government, and the entering into office of the new officers, and *no longer*. This then is the real tenure of the old officers, to remain in office in order that no inconvenience should result to the public service, until their successors are appointed and enter upon the discharge of their duties.

In connection with this view, the attention of the Court is particularly called to the closing phrase of the article, "and no longer." Why are these words of limitation inserted? If, as is contended for by the respondent, the old incumbents were entitled, under the Article, to hold until the expiration of their respective terms of office, then the power to appoint in their stead would not exist under the new Constitution until their terms had actually expired. In that view it was more than idle to say, they were to hold until the new officers should enter, and *no longer*, because no doubt could possibly arise but that they could properly be ousted at the expiration of their terms, by new appointments, and the declaration that they should not hold for a longer period than their term warranted, is meaningless.

But the framers of the Constitution had an intention and a meaning in the insertion of these limitative words, one too directly applicable to the case before the Court. An officer appointed under the old Government might insist, when a successor was appointed to him under the new, that he had a right still to hold, as his term had not expired. And for him asserting such a claim, was the closing phrase of the Article designed, declaring he should continue to hold only until his successor was appointed, and no longer. That is, that he should not be allowed to justify his refusal to surrender the office to the new appointee, upon the pretext that he had a *longer* time to serve.

But it is said that the officers spoken of and designated in the Article 144 are, as termed by the respondent, constitutional officers, that is, such officers as are especially mentioned in the body of the limitation itself, and that it is to them only the limitation to hold until their successors are appointed, applies.

If this were true, then, as the clause referred to is the only one retaining the officers after the extinction of the Constitution under which they were appointed, the right to hold office of all those officers which are not included in the designation, would have ceased to exist by the adoption of the new Constitution and the superseding of the old.

But there is, in truth, no warrant to be found for this interpretation. The terms used in this Article are general; they apply as well to constitutional officers as to all others: "the several officers, Executive, Judicial and Military," are terms which comprise every office within the limits of the State. They are the technical words used in most of the Constitutions of our sister States, as being the most apt and proper to include, by the largest expression, every person exercising authority under the organic law.

Thus the Constitution of Vermont, chap. 2, art. 29, provides that "Every officer, whether judicial, executive or military, in authority under this State, before he enters, &c., shall take and subscribe, &c., &c." Similar provisions are to be found in the Constitutions of Maine, Connecticut, New York, Alabama, Mississippi, Kentucky and Michigan.

It so happens, also, that there are no constitutional officers, that is, no officers mentioned in the Constitution and embraced under the terms "military;" for the Constitution no where speaks of any military officer. To sustain their views, therefore, the counsel of the respondent are compelled, contrary to every sound canon of interpretation, to give to general words a limited and qualified signification, when nothing in the context calls for the limitation, and besides, in adopting such an interpretation, and limiting the words "officers, Executive, Judicial and Military," to constitutional officers, they are obliged to exclude a portion of the very officers named in the Article, to wit: military officers who are not constitutional officers.

Were it necessary to say more in reply to this view, a reference to the term used in the Article with regard to officers there spoken of, would suffice to show that the framers of the Constitution were providing for *other* than constitutional officers. The expression referred to is "the new officers to be *appointed* under said Government."

All the constitutional officers are *elected* by the people. Had they solely been included in the Article, the phrase used would obviously have been "the new officers to be *elected* under the said Government;" but as in reality all officers, constitutional and others, were embraced in the provision, the larger expression, "appointed," was of necessity adopted.

The counsel for the respondent say, "If the statute, (the Act of 1844,) is in full force, and *Crenshaw* was duly appointed under, you cannot remove him without further legislation. The effort to distinguish between the office and the officer created by this Act must fall. The Act exists, office and officer, as a whole." I have shown that the terms of office of *Crenshaw* and of other officers, existing at a certain time, had been curtailed by legislation, i. e., the enactment of a new Constitution, subsequent to his appointment. In this respect he does not stand alone—the terms of other important officers were curtailed by the same Constitution, and that without affecting, in the least, the existence of the laws which created their offices and defined the duties of them. The proposition that the statute of 1844 exists as a whole, office and officer, and that the office must cease to exist and the law which creates it become a nullity, if the term of any particular incumbent is curtailed, is preposterous. It is only the expression of a very common whim and fancy of public officers, of long standing in office, who gradually persuade themselves that their services cannot be dispensed with: but it has not the slightest foundation either in law or common sense. *Mr. Crenshaw* might die in office or be removed by address, before the expiration of his term. Would this change, in the least tittle, the law of 1844? The Legislature might have passed an act saying in so many words, "the present Register of the Land Office shall continue in office until the month of May, 1853, and no longer;" or, in more general terms, "the present officers of the State shall continue in office until the month of May, 1853, and no longer." Would this have been held to amount to a repeal of the laws creating their offices, or even a change of the terms fixed by those laws? Surely not! As special provisions, they would operate upon a special set of officers, and not upon their successors. Special provisions do not repeal general ones; for instance, the term of the first Governor, under the Constitution of 1852, is only

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three years, whilst the term of his successors will be four, and so of the terms of many of the present officers of the State. Does this special disposition, with regard to the first officers elected under this Constitution, interfere with, repeal or set at naught the general provision fixing the term of those officers? Where is the repugnancy?

The very Article 144, which the counsel has labored to twist and transform to suit his case, makes the distinction which the counsel denies as broadly as it can be drawn. "No office shall be superseded," no office shall lapse by the fact of the adoption of the Constitution. Every law creating certain public functions, regulating the mode and manner of their discharge—which constitutes *the office*—shall remain in force; but the then *officers* shall continue to discharge those functions, only until the organization of the new Government.

The counsel asks, "if it is not most clear that Article 144 applies only to those new officers who would have held, in opposition to the elective principle established by the new Constitution?" If the last clause of that Article was intended to apply only to such officers, why was not the distinction made? Why were the most general and comprehensive terms used? That the Constitution did assume the principle that it was necessary to establish a temporary Government to avoid anarchy, until the new could be organized—that they, as well as other Conventions, thought it necessary, in the establishment of this temporary government, to provide *officers*, as well as laws—cannot be denied. But where is the provision to be found for the officers excluded—for they, too, are necessary to carry on this temporary government—if the distinction contended for by the counsel is well founded? Have other Conventions, guided by the same general principles—for each art or science has its peculiar principles, rules and modes of action—admitted the distinction? They only differ in this, that in two or three instances a particular class of officers of the temporary Government is *continued* in office for a longer term than another; but the provision to *establish* these temporary officers is general, including every class and description of officers. In the Constitution of our State, the same officers that are *established* are *continued*, and in the same sentence and connection. To make a distinction between one class of officers and another, would be to charge the Convention with the grossest inconsistency, and to suppose that they could, with the same stroke of the pen, admit a general evil and provide but a partial remedy.

I am at a loss to discover the bearing of the cases of *Bry v. Woodruff*, 8 L. R. 557 and *Kelly v. Gilley*, 5 Ann. 584, upon the present controversy. The office of President of the Board of Public Works was held by the Supreme Court, in the first case, to be a periodical office, that is to say, an office, the term of which was to commence and expire at certain fixed points of time—fixed either absolutely or relatively. The law creating the office is in these words: "The Governor, as soon as may be after the passage of this act, and EVERY TWO YEARS thereafter, shall nominate and appoint, &c." Here the points of time at which the office is to commence and terminate is fixed by fixing the periods when the appointing power shall be exercised. In *Kelly v. Gilley*, the office of notary being then for a term of years, and not a periodical office, they held that appointments made in cases of vacancy should be for the full term of four years, and not for the unexpired portion of the term. The offices of Justices of the Supreme Court, Governor and others, are, by the present Constitution, made both offices for a term of years, and periodical offices; for their duration is limited and the points at which they commence and terminate are also fixed. But the office of Register, although an office for a term of years—for two years—is not a periodical office. There is not a single expression in the law creating it, there was no reasons of policy to induce the Legislature to make it a periodical office.

I beg leave to call the attention of the court particularly to the limit fixed by Article 144, to the tenure of the temporary officers provided by it. They hold "until the organization of the Government under this Constitution, and *the entering* into office of the new officers to be appointed under said government and no longer." The limit is "the organization of the Government under this Constitution." The phrase "and the entering, &c." is nothing but a modality, or qualification of that term, similar to and synonymous with the phrase "and until their successors are duly qualified," which is to be found in clauses fixing the terms of offices and which was intended in the present case to maintain the

officers in office during the intermediate time between the expiration of their terms, to wit: "The organization of the government," and the moment when the Governor could exercise the appointing power and his new appointees could qualify themselves, and be ready to "enter into office." The Convention did, in adopting this "modality" or "qualification" of the term which they had fixed, what they themselves required the Legislature to do, when they fix the terms of offices. See Art. 125, Const. 1852.

For the discussion of other topics which have been introduced in this case, I beg leave to refer this Court to the very full and learned opinion of the Judge *à quo*.

Davidson & McHatton, for respondent and appellant:

This brief is submitted to the honorable the Judges of the Supreme Court of the State of Louisiana, in the case of *L. J. Sigur*, for a mandamus against *Wm. H. Crenshaw*, Register of the Land Office, created for the State of Louisiana, by the act of the Legislature of March 25th, 1844. (See Digest of 1852, p. 440.) Which, upon the hearing, was made absolute by the Judge of the Sixth District Court, for reasons and arguments assigned in his opinion; from which opinion and judgment *Crenshaw* appeals, and prays to have the same reversed, because it is manifestly contrary to law, and the decisions of your honorable Court. The act of 1844 creating the office, creates the officer; the act and the officer exist together, and are up to this time intact. The first section names a constitutional officer to the office of Receiver.

The second section is in this language: "The Register of the Land Office shall be appointed by the Governor of the State of Louisiana, by and with the advice and consent of the Senate, and shall hold his office for the term of two years, unless removed in due course of law, and unless all said lands shall be sold before that time, when it shall be in the power of the Governor to discontinue this office, &c.

The third section fixes and defines the oath to be taken. Now the only question in all this controversy is, whether this law is now in force, or whether it has been changed or modified by any subsequent enactment, or by the Constitution of 1852.

The facts are all agreed to, and are these: *Robert J. Ker* was appointed March 30, 1844, March 23d, 1846, and February 12th, 1848. *Richard Loucks* was appointed March 26th, 1850. *William H. Crenshaw*, this defendant, was appointed November 9th, 1851, to take effect November 10th, 1851, for the unexpired term of *Loucks*, resigned. On the 2d day of February, 1852, this appointment, made in the recess, was confirmed by the Senate; and on the 14th day of February, 1852, *William H. Crenshaw* was appointed and commissioned for two years, from the 25th day of March, 1852. According to the statute of the 25th March, 1844, creating this office, and the decisions of your honorable Court in the case of *Bry v. Woodruff*, 13th Louisiana Reports, page 556, and of *Kelly v. Gilley*, 5 Annual, 534, where you recognize the principle, that an appointment under the law for a fixed period is to hold for that term of time. The language of the statute creating the office of the President of the Board of Public Works, under which the decision of *Bry v. Woodruff* was made, is to be found in the Louisiana Digest, p. 45, art. 254, and is in this language:

"The Governor, as soon as may be after the passage of this act, and every two years thereafter, shall nominate and appoint, by and with the advice and consent of the Senate, a President of the Board of Public Works."

The term of tenure of this office is fixed for two years, and is so decided. *Crenshaw's* appointment, under the act of 25th of March, 1844, holds, under the legitimate construction of this decision, up to the 25th of March, 1854, and no appointment can be made in this interval, (unless it is to fill a vacancy,) without a violation of the statute and your decisions. The Governor, then, when he, on the 31st day of March, 1853, appointed *Laurent J. Sigur*, without limiting the appointment to the unexpired term of *Crenshaw*, assumed legislative authority in direct violation of the Constitution and of the law, as defined by your Court, one of the co-ordinate branches of this Government.

The relator, however, considers his nomination by the Governor and confirmation by the Senate, the creation of a vacancy, and the filling the office under the law, or, in other words, that the confirmation by the Senate was a virtual recognition by the legislative department of his appointment. This brings up the powers of the Senate. Now all they do, is simply to advise upon the quali-

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fications of the individual named for an office: they have no power to decide an office vacant or not vacant. When they undertake this, they will do what we complain and allege the Governor has done—assume rights that do not belong to that branch, which, when taken in connection with the Governor in making appointments, have only power to advise upon appointments, and can go no further. This, therefore, can confer no authority, unless the appointment is sufficient in all other respects.

The counsel in this argument holds, that the executive office is a continuous source of power, and is not interrupted by the going out or coming in of individuals to the office of Governor; their names are only used or known in relation to this office to mark the epoch. An appointment made under the law, and properly made, as in this case, is not made in reference to the political prejudices of the individual who exercises executive authority, but is made by this fountain of power, for the public service; and when the office is for a fixed period, it is then completely beyond the reach of the executive or the appointing power, so far as the power of the executive is concerned. This has been so held by the first tribunals known to our laws. The Supreme Court of the United States held, in the case of *Marbury v. Madison*, (see vol. 1 of Peters' Condensed Reports of the Decisions of United States Supreme Court, p. 267) "that the power of the executive over an officer not removable at his will, ceases when the constitutional power of appointment has been exercised by the last act required of him, which is the signing the commission." If the officer is not removable by the executive, the rights acquired by him under the appointment are not resumable by the executive. There appears to be this difference between an office limited in its duration and tenure, and one held by the sufferance of the executive will and pleasure. That under the one of limited duration, the officer acquires certain fixed rights, those given by the law of creation. In the other instance, he acquires no fixed rights. For in the case of *Marbury v. Madison*, the Court held that when an officer is removable at the will of the appointing power, a new appointment may be immediately made, and the rights of the officer superseded and terminated. All commissions issued (to officers whose office is not limited by the creation) by the President, expressly declare the reserved rights of the executive department to remove the officer at his pleasure, and he takes the office with this distinct understanding. This, then, if the Court please, is the law, and the understanding of the law, by the defendant and his counsel.

The relator concedes that *Crenshaw* was properly appointed, commissioned and qualified, on the 14th of February, 1852, under the act of 25th March, 1844, Register of the Land Office, and is Register, so far as that appointment, commission and qualification can make him. But he contends, and the Court of the first instance holds, that the Governor has the right to remove, or that the Constitution of 1852 gave to the Governor elected under it, the power to remove and re-appoint all the officers known to the laws or Constitution. This power is claimed and decided upon, under the schedule, and under Articles 142, 143, 144 and 145, embraced in the Constitution. Now let us inquire how far this view of the case can be relied on. Schedule, according to Webster, (and his definitions are popular with the Judge *a quo*,) means a piece of paper or parchment annexed to a larger writing, as to a will or a deed, or a piece of paper containing an inventory of goods. I choose then to consider it as an inventory of powers given, or as a direction or indication of the manner in which they are to be carried out.

The case in 8d Martin, page 2, *Bermudez v. Ibanez*, and of *Dufau et al. v. Massicot et al.*, p. 291, show to the Court of that day, and they held that the schedule of the Constitution of 1812 intended that the organization of the territorial Government, controlled by the acts of Congress, and ruled by officers appointed by the President of the United States, should continue until the territory was duly and properly admitted into the Union of the States, by accepting the Constitution prepared by the Convention, called in accordance with the acts of Congress, authorizing the people of the territory of Orleans to form a Constitution and a State Government, for admission of said State into the Union on an equal footing with the original States, and for other purposes.

These decisions were good law, and I do not desire to controvert them; for if the territorial organization did not continue, there was none; for this Constitution had to be accepted by Congress, and the State, under the Constitution,

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admitted into the Union before the officers of federal appointment and Government under the order of Congress, could be superseded. Therefore, the decision could not be otherwise. But the difference of a sovereign State amending, either by enlarging the power of its citizens, or explaining more explicitly the powers of any or all the branches of the Government, is manifestly different from an effort by permission of a superior power to an inferior, to form its organic law, and to be permitted (if the law adopted by the inferior is accepted by the superior) to assume equal rights of sovereignty with each of the individualities who constitute the superior power. Will the Court assume the ground in this decision taken by the Court below, that there was no necessity to submit this Constitution of 1852 to the people for their approval? How this doctrine could hold, if it were necessary here to controvert it, is not necessary to discuss. I refer to it, to express my dissent. This argument is to show the absurdity of the argument that the case of the officers holding under the statute of the sovereign State of Louisiana, are in the same category with the officers who held under the President of the United States and acts of Congress, when we went out of the territorial dependency into the State Government. Now if my view of the definition given by Webster of the schedule is correct, to wit: an inventory of the powers given, and an indication of the manner in which these powers are to be exercised, let us see what are the powers given. Article 47 of the Constitution of 1852, in relation to executive power, provides that he shall nominate, by and with the advice and consent of the Senate, appoint all officers, whose office is established by this Convention, and whose appointment is not therein otherwise provided for. Provided, however, that the Legislature shall have a right to prescribe the mode of appointment to all other offices established by law. The Section 48 gives the power to fill vacancies occurring in the recess; the other Articles, to Article 60, enumerates all other powers given to the Governor, which are inventoried in the schedule of powers given; now to the exercise of the power given in Article 47, that the Governor shall, by and with the advice and consent of the Senate, appoint all officers whose offices are created by this Constitution, and whose appointment is not therein otherwise provided for, we have no possible objection. The proviso to this Article is made for our benefit, and we claim its protection. It is this, provided, however, that the Legislature shall have a right to prescribe the mode of appointment to all other offices established by law. We claim the enforcement of this proviso, and abide by it. Does the schedule repeal this Article? or is there anything in the schedule contrary to it? Then if the Legislature has considered the mode of appointment already prescribed sufficient, and we have been appointed in a mode which was satisfactory to the legislative department, how can the executive department, without a violation of the legislative department, make an appointment to this office of Register during the term for which *Crenshaw*, the defendant in this action, has been appointed. More particularly when Article 143 of the schedule expressly declares all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in full force at the adoption of this Constitution, and not inconsistent therewith, shall continue as if the same had not been adopted. The law of the 25th of March, 1844, was in force and not inconsistent with any Article of this Constitution, and is recognized to be in full force by the legislative department, because they refused, as will be seen by the journals, to suspend the sales of the public lands, and have passed numerous acts, directing the manner of entering the land and disposing of the proceeds. Then by this Article 143 of the schedule, the act of 1844, creating this office, is still in force. The effort to distinguish between the office and the officer created by this act must fail. The act exists, office and officer, as a whole; the statute must survive or fall as a whole.

If the statute is in full force and *Crenshaw* was duly appointed under it, you cannot remove him, without further legislation—more particularly when Article 144 says that no office shall be superseded, not officer, for there are a class of officers who would, under the Constitution of 1845, hold offices in direct opposition to the provisions of this Constitution. Consequently they have properly said: "In order that no inconvenience may result to the public service from the taking effect of this Constitution, no office shall be superseded." Would they have said this, if these offices were not to be filled in a different manner? Here is the solution to the great difficulty, that has required so many *Constitutions* to illustrate.

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The offices are to be filled in a different manner, and are not superseded, but the laws of the State relative to the duties of the several offices, executive, judicial and military, shall remain in full force, though the same be contrary to this Constitution. How, contrary this Constitution? Why, because their mode of appointment has been changed by this organic law, they being Constitutional offices. Their several duties shall be performed by the respective officers of the State according to the existing laws.

What offices? Those of the Constitution just mentioned, until the organization of the Government under this Constitution and the entering into office of the new officers to be appointed under said Government, and no longer. Now, if this does not fully prove my notion of the schedule to be correct, I am free to confess my error. If the view of the relator and judge is right, and the Register is a statutory officer, and is one of those meant here—then the moment *Mr. Sigur*, the relator, is qualified and enters upon the duties of his office, as one of the new officers created by this schedule, then the law creating his office ceases to exist. But the laws of the State, relative to the duties of the several officers, executive, judicial and military, shall remain in full force, though the same be contrary to this Constitution, until the new officers are appointed, and no longer.

Now, is it not most clear that this Article only applies to those new officers to be appointed, who would have held, in opposition to the elective principle adopted by the Constitution to which this schedule is annexed? With this understanding all appears clear. The statutory officers remain with the statute—these are not superseded. Officers of a limited tenure remain, and cannot be removed by the executive branch of the Government.

Those of unlimited duration are at his mercy, because Article 96 of the Constitution of 1845, is superseded by this Constitution, and this class of officers are governed by this statute of creation. I have, perhaps, trespassed too much upon the time of your Court. When I have the case of *Trepagnier v. Crosat* before me, and perceive from the tenor of that decision the Act of 1811, which gives this appointment to the Governor, is recognized by your Court as the source from which he derived the power to make the appointment.

If the reasoning in that case, against which the Judge *a quo* in this case has argued so learnedly, going into elementary principles of public policy, and deducing the power of the Governor, and, therefore, his duty to make this appointment, to organize a Government already organized—to use a power not exercised or claimed by the individual who exercised executive authority under the Constitution of 1845—I say again if the reasoning in that case is to be applied to this case, there can be no reasonable doubt that your honorable Court will reverse the judgment we complain of, and dismiss the petition of the relator, because he cannot take this office with the appointment he has under the Act of March 24, 1844.

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1st. All offices are creatures of the organic law; or of Legislative enactment, which designate the manner in which the officers shall be appointed. After the appointment of the officers, they are removed from under the control of the appointing power, unless the duration of the office, or the term of the officer is left expressly at its will. 7 Cranch. 505.

2d. The constitution of 1845 was superseded by the constitution of 1852, but all laws in force at the time of its adoption, not inconsistent therewith, shall continue as if the same had not been adopted. Art. 148. Laws contrary to the constitution, requiring duties to be performed by the several officers, executive, judicial and military, to remain in force, and the duties of the several offices to be performed as those laws require, until they were changed, to conform to the constitution; "and as to the organization of the government, under the constitution and the entering into office of the new officers to be appointed under said government and no longer." A government is to be organized by the Legislature in conformity with the constitution; new officers appointed in the manner the constitution requires are to supersede the old. All this had nothing to do with the Act of 1844, or the Register of the Land Office.

8d. The IDEA that a government—the embodiment in FORM of the sovereignty of a people of a State, is to be assimilated to a private corporation, is a retrogression in political science. There is at least this difference between them. The *form* of a government may be abolished—the constitution changed,

while sovereignty, which is a self-existing, indestructible essence, continues to exist. The private corporation, created for specific purposes, and for the benefit of certain persons, receives its form, its constitution and franchise, with its charter, all spring into existence with the same breath; and expires at the same moment. The franchise is not a self-existing and indestructible essence as sovereignty is, which can assume a new form, when the old form or embodiment has crumbled into "nothingness."

4th. If the Act of 1844, creating the office of Register, is not contrary to the constitution, or the government established under its authority, the removal of the defendant is contrary, both to the Act of 1844 and the constitution, unless he was removed in due course of law.

Sigur—Supplemental Brief.

I have shown, in the brief filed when this case was submitted, that it was a universally admitted principle, derived from the soundest rules of law and common sense, and acted upon by all the conventions which have from time to time assembled in the different States of the Union, to frame a constitution or to remodel and recast the existing one.

1. That the adoption of the new constitution, or as it is sometimes called, the new "form of government," (see Sec. 9, Const. Mass.) supersedes the old one in every and all its parts, and specially,—

(a) That all the officers, of every grade, class and description, deriving their authority from, and holding under the appointment of any branch or department of the defunct constitution, whether they have been elected or appointed to office, or whether their tenure is for life or for a term of years, are "*functi officii*," by the fact of the adoption of the new constitution.

I have shown by the explicit texts of our State constitution, and by the decisions of our own Courts,

2. That "to the end that there may be no failure of justice, or danger arise to the Commonwealth," and "no inconvenience ensue to the public service," from this sudden and simultaneous death of all officers of the State, "it became necessary, in the language of *Judge Matthews*, in order to avoid ANARCHY, to create a kind of intermediate (and temporary) government, the duration of which would expire when the permanent governments were organized and went into operation;" that "these two governments (the temporary and permanent,) are DISTINCT and SEPARATE;" that "THEY ARE TO SUCCEED ONE TO THE OTHER;" that "THEY CANNOT BE BLENDED IN WHOLE OR IN PART."

(a) That these temporary or intermediate governments are generally formed and constituted with the "personnel" of the old government, by continuing them in their respective offices, "UNTIL they are superseded under this (the new) constitution," or "UNTIL the organization of the new government," or UNTIL the end of the first session of the Legislature, under this (the new) constitution," or "UNTIL" some stated day during or shortly after the first session of the first Legislature assembling under the new constitution. In some cases, as in the constitution of New Hampshire, the Legislature is authorized to fix the time when the new constitution shall take effect, and directed to make the necessary arrangements for the organization of the new government, in order that "there may be no failure of justice or danger to the State." (See Const. N. H., under the head of "Oaths and Subscriptions, &c.;") all these provisions manifesting plainly the intention of these conventions, that the then existing organization should last only UNTIL the new one could be framed and set in motion, and "no longer."

(b) That whenever the framers of the constitutions of our sister States have thought proper to deviate from the general principle and to make a distinction between one class of officers of the defunct government and another, with a view to continue one in office after the organization of the new administration, they have deemed it necessary to do so in express terms, and by a special provision, which would have been useless, and the "vilest tautology," in any other hypothesis than the one for which I have contended. These special provisions, these specific exceptions, would be useless and meaningless, unless they are regarded as recognitions of the general principle, and as so many admissions that, without them, the excepted officers would have followed the fate of all the others, embarked in the same discarded hulk. Thus the constitution of Ohio, of 1852, (sec. 5 of schedule,) provides, "that the *Register and Receiver of the Land Office*, Directors of the Penitentiary, Directors of the Benevolent Institu-

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of its meaning, have contended that the words "no OFFICES shall be superseded thereby," were sufficient to continue, and were actually intended to continue all officers in office—that they meant nothing more nor less than, "no offices shall be VACATED thereby." This is almost too absurd to require serious refutation; for the most cursory examination of Art. 144, must convince any one that such an interpretation would render the different provisions of that article confuse, contradictory, tautological, and even ungrammatical, besides giving to words a signification which they cannot have, either in legal or common parlance. The sentence, according to this version, would read thus, "all the officers of the State will continue in office notwithstanding the adoption of this constitution: BUT the laws of the State relative to the duties of the several officers, executive, judicial and military, shall remain in full force, though contrary to this constitution." What a wry face the particle BUT makes here! The inventors of this new reading say, that Judge Eustis did not exactly understand the meaning of and the shades of difference between BUT and AND, and admit that had they been chairmen of the committee on style, (this article is copied *literatim* and *verbatim* from the constitution of 1845,) instead of the learned and scholar judge, they would have used the latter conjunction.

(d) The next step taken by the Convention to prevent the inconveniences which would ensue from the adoption of the new constitution, superseding that of 1845, was to continue the then acting officers in office, "until the organization of the new government under the new constitution, and the entering into office of the new officers, to be appointed under said government and no LONGER." The words used to affect this, are the largest and most comprehensive; "and the several duties shall be performed by the respective officers of the State, according to the existing laws, until, &c. The terms, 'several' and 'respective,' include the ideas of classes and relation, and evidently refer to the "executive, judicial and military officers," mentioned in the preceding sentence. These "several duties" are the duties prescribed by the laws relative to the executive, judicial and military officers of the State, whether these laws be contrary to the constitution or not; the "respective officers," are the officers of the several classes enumerated—the officers filling the executive, judicial and military offices—in a word, all the officers of the State; for the terms, continuing the officers, are evidently, from their connection, co-extensive with the terms continuing "the laws, relative to the duties of the several officers, executive, judicial and military." Besides, the same motive which prompted the Convention to continue ALL the laws regulating the duties of the several officers of the State, "though the same were contrary to this constitution," (which it was not disputed, included also the laws that were not contrary to this constitution,) precludes the idea that they could have admitted, or did intend to admit a distinction when they came to provide for the filling of those offices. "*Eadem ratio, eadem lex.*" They have, on the contrary, employed the most comprehensive language, excluding all distinction or exception, which, taken in connection with the preceding sentence, cannot leave the slightest shadow of a doubt in any candid mind.

(e) But how long were these officers, all and every one of them, continued in office? The answer given by the concluding sentence of Art. 144 is explicit. Until the organization of the Government under this Constitution, and the entering into office of the new officers to be appointed under said Government, and "no longer." "This organization," as Judge Matthews says, "was not the work of a day, as some persons may have fancied. It was to take place by degrees." The election of the Executive, provided for by the Constitution itself, was the first step towards the "organization" of his branch of the Government; when afterwards the Legislature met, and the Senate was at hand to exercise with the Governor the appointing power, the Executive department was, *quoad hoc*, fully organized, and all the officers of that department, who by the laws or Constitution held their offices under it, and by its appointment became liable to removal, or re-appointment, and were "*functi officio*" as soon as the new officers had qualified, and were ready to "enter" upon the discharge of their duties.

It has never been pretended that the words "and the entering into office of the new officers to be appointed under said Government," constituted a separate and substantive term, distinct from the term established by the words "until the organization of the Government." Such, or similar words, are to be found

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in most of the Constitutions and in laws fixing the limits of the tenure of public officers, to provide for occasional and sometimes necessary deviations from these limits. They are modalities or modifications of those terms.

The positions assumed by the counsel for the respondent, besides the refutation which they have already received in the course of this argument, may be briefly, directly and conclusively answered.

The first position is, that "Article 144 applies only to such officers as would hold in opposition to the elective principle established by the Constitution of 1852."

My answer is,

10. The principle which dictated Articles 142, 143 and 144 of the Constitution of 1852 is broader than the one assumed in this argument and includes all officers, without distinction.

20. Article 144 excludes all distinction, not only by using the most general and comprehensive terms, but by enumerating officers whose mode of appointment is in no wise affected, changed or altered by the new Constitution, to wit: "military officers," besides a host of executive and judicial officers whose duties, terms of office and mode of appointment remained untouched by the new organic law. I say that the article "enumerates those officers," because I assume, what I think cannot be disputed, that the sentence "and the several duties shall be performed by the respective officers of the State," refer to the "several duties of the executive, judicial and military" departments, and that the "respective officers" can be none other than the "executive, judicial and military officers;" so that, although the enumeration is not made in the last clause of the sentence, it is clearly carried into it, by the most obvious grammatical implication. If the Convention intended to except the Register and Receiver of the Public Lands from the general rule, they would have said so in so many words. It is a rule of law and of reason that exceptions to a general rule are not presumed. "*Exceptio fit, non derivatur.*"

The other position is, that the Constitution of 1852, by continuing the law creating the Register and Receiver of the Land Office and defining the term and mode of appointment of that officer, continued him in office for the full term of his appointment.

To this I answer,

10. The Constitutions of the different States and our own, more especially, clearly show that in the opinion of their framers, the provision continuing the laws relative the duties of the several officers of the State, was not sufficient to continue the officers. They all contain separate and distinct enactments for the former and for the latter. The Constitution of Louisiana of 1852, besides the general provision maintaining in full force "all laws not inconsistent therewith, contains a special one in Article 144 "for the laws relative to the duties of the several officers of the State," whether they be contrary to the Constitution or not. Now this provision being a special one referring particularly to officers, the counsel for respondent must rest their pretensions upon it, and not upon the general one in the preceding article. But if those pretensions were well founded, what would be the use or meaning of the sentence immediately succeeding, continuing the officers? Do they suppose that, all through this schedule, the Convention has been dealing in mere idle, unmeaning tautological verbiage?

20. The continuance of the OFFICE has not *in fact*, and therefore has not *in law*, the effect of continuing the OFFICER. For, although the "officer" cannot exist without the "office," the "office" can and often does exist without the "officer." *Crenshaw* might die and the office remain vacant for days, for weeks. The Legislature might neglect to make provision for the election of a successor to the incumbent of an office, as in the case of *Houston v. Royston*, in 7 How. Miss. Rep. 543. In another case, of *Smith v. Halfacre*, 6 How. Miss. Rep. p. 602, the office was created by the Constitution of 1832, but the officer was elected only in July, 1836. Chief Justice Sharkey, *arguendo*, says: "We cannot agree with counsel that the office of Judge of the 8th Judicial District was an office created by the Legislature. The District was created by the Legislature, but the office was created by the Constitution. The Constitution created the office without any reference to any District. There was no Judicial District at the time the Constitution was adopted: all Districts had been abolished. As well might we say, therefore, that the Legislature created the office of Circuit

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Judge for the four Districts which were organized or established by the first Legislature which met in January, 1838. The Constitution provided that the State should be laid off into convenient Districts, and when so laid off Judges were to be elected by virtue of the Constitution, and not by virtue of the law." Did the fact of the non-existence of an incumbent, in these cases, carry with it the destruction of the offices and the repeal of the laws creating them? Surely not; for there is no necessary connection between the existence of the latter and the former, which the argument of the respondent's counsel assumes.

It has been less my object, in this brief, to introduce any new matter or argument, than to arrange the matter and arguments of my former brief, which was hurriedly written, whilst suffering from a violent migraine, in a more logical form. I have only to beg the Court to excuse me for this additional infliction, and to urge in extenuation of the offence, and some slight consolation for the Court, that Cicero "pro domo sua" is much more tolerable in writing, than *via voce*, as the amiable and patient Judge of the inferior Court may attest.

SLIDELL, C. J. The Convention did not amend the Constitution of 1845, but framed a new Constitution. By the express terms of Art. 142, the Constitution of 1852 was to supersede the Constitution adopted in 1845. The natural consequence would seem to be that the Government which existed under, and by virtue of this old Constitution, would be simultaneously superseded. But, as time was necessary for the organization of a new Government under the new Constitution, and as great inconvenience would result from the *interregnum* which would otherwise occur between the displacement of the old Government, and the organization of the new, to prevent this inconvenience the Article 144 was framed. The desired object was secured by the simple expedient of continuing the old officers in service, until the new Government should be organized and the new officers enter into office. Such I understand to be the true spirit and meaning of the schedule.

I find it impossible to reconcile the pretensions of the defendant, with the emphatic words "*and no longer*," which are used in Article 144. If it was intended, as he argues, that the old incumbents were to hold until the expiration of their respective terms of office, those words would be mere surplusage. For no doubt could arise but that they could be ousted at the expiration of their terms, by new appointments.

The construction claimed by the plaintiff is strengthened by a reference to Constitutions of our sister States, which he has cited. Some of them exhibit express reservations in favor of antecedent officers, continuing them in office during their unexpired terms, or until some stated day, reservations which would have been surplusage, because implied, if the defendant's argument be sound. In our Constitution no such express reservation is found. The officers, executive, judicial and military, are to perform their duties "*until* the organization of the Government under this Constitution, and the entering into office of the new officers to be appointed under said Government, and *no longer*." The last words seem to have been used out of abundant diligence and caution, to exclude implication and shut out just such a discussion as is raised by the defendant.

I think the judgment should be affirmed.

CAMPBELL, J. I concur in the opinion just pronounced by the Chief Justice, and think the judgment should be affirmed.

ODGEN, J. The relator was nominated by the Governor, and with the advice and consent of the Senate, appointed Register of the Land Office, at Baton Rouge, for the term of two years, commencing on the 31st of March, 1853. His right to the office is contested by the defendant, who claims it by virtue of a

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commission from *Governor Walker*, under the former Constitution of 1845, conferring the same office on him for the term of two years, from the date of his commission, the 14th of February, 1852. The question involved is, whether by the correct interpretation of the Constitution of 1853, it was the duty of the Governor elected under that Constitution, with the advice and consent of the Senate, to make new appointments to all offices in the State, then held by virtue of commissions from the Executive, under the superseded Constitution of 1845. This question was not decided in the case of *Trepagnier v. Crozat*, because it was not considered as necessarily involved in a case where the office, by law, was held at the pleasure of the Executive. According to our theory of Government, a written Constitution, adopted by the people themselves, precedes the enactment of municipal laws to govern them, and is the necessary basis for a superstructure of what we recognize, and call a Constitutional Government. In most of the State Constitutions, as in our's, there is a mode provided for such changes and additions to organic law as experience may prove to be wise and proper. Such alterations, therefore, consistently with the acknowledged theory, may take place without disturbing the existing organization of the Government, but where the people, in the exercise of their sovereignty, deliberately put an end to the existing Constitution, and adopt an entirely new one in its stead, all powers of Government under the old Constitution necessarily cease, except in so far as they are maintained in existence by the new Constitution. No one has such a vested right to office as to resist the necessary consequences of an entire abrogation by the people of the Constitution, under the authority of which he holds it. Rights to property and the obligation of contracts stand on a different footing, and I do not understand Article 143 of the Constitution as applicable to the right to an office—the sense in which the term is used in that Article, in my opinion can have no such meaning. Such a construction would also be inconsistent with the two following Articles. Article 144 declares that in order to prevent inconvenience to the public service from the taking effect of the new Constitution, no office shall be superseded thereby, and directs that the several duties shall be performed by the respective officers of the State, according to the existing laws, until the organization of the Government under the new Constitution, and the entering into office of the new officers to be appointed under said Government, and *no longer*. The next, Article 145, declares “appointments to office by the Executive, under this Constitution, shall be made by the Governor, to be elected under its authority.” I consider from these two Articles in connection, that the design of the Convention, as therein expressed, was to prevent the consequence which otherwise would have ensued, of all offices being vacated immediately on the adoption of the new Constitution, and at the same time to limit the period of continuance in office of the officers under the old Constitution, and to provide for the appointment of their successors under the authority of the new Constitution. A different construction would, in my opinion, leave some of the expressions used in these Articles without any meaning or effect whatever. I cannot regard the Constitution of 1852 as merely a change in some respects of a subsisting State Government, and I think that could not have been the sense of the Convention, from the fact of their taking especial care in the schedule to guard against the inconveniences of passing from under an old Government to an entirely new one. The cases of *Bermudez v. Ibanez*, and *Massicot v. Dufau*, 8 Martin R., O. S., appear to me fully to sustain this view of the subject, and I see nothing in the circumstances of this case

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which requires the application of a different principle from the one determined in these cases. My conclusion is, that by the Constitution, the Governor had the power, with the advice and consent of the Senate, to make a new appointment to the office in question, and that on the appointment of the relator being made, by effect of the new Constitution, the defendant's right to the office ceased.

The judgment of the Court below, in my opinion, should be affirmed.

BUCHANAN, J., (dissenting.) The respondent and appellant, *W. H. Crenshaw*, was appointed Register of the Land Office at Baton Rouge, on the 9th November, 1851, during the recess of the Senate, to fill the unexpired term of *Loucks*. This recess nomination was confirmed by the Senate on the 2d day of February, 1852. On the 14th of the same month and year he was again nominated by the Governor, and confirmed by the Senate, for the full term of two years.

He furnished the required bond and took the oath of office on the 16th day of March, 1852.

The relator, *L. J. Sigur*, was nominated by the present Governor of the State and confirmed by the Senate on the 31st day of March, 1853, Register of the Land Office at Baton Rouge, for two years, commencing on the 31st of March, 1853, the date of his commission. He took the oath of office, required by article 90 of the Constitution of 1852, and furnished the legal bond and security on the 2d day of April, 1853.

W. H. Crenshaw having refused to vacate the office and to deliver the papers, books, charts, maps, &c., appertaining to it, to the relator, the latter sued out a mandamus to compel him to do so. From the judgment of the Court, making this mandamus peremptory, *Crenshaw* has appealed.

The facts, as stated above, are admitted: and the question which has been submitted for our decision is: Had the term of office of *Crenshaw* expired when the Governor appointed *L. J. Sigur* to succeed him?

The statute which created the office in question, was approved the 25th March, 1844. Its second section reads as follows: "The Register of the Land Office shall be appointed by the Governor of the State of Louisiana, by and with the advice and consent of the Senate, and shall hold his office for the term of two years, unless removed in due course of law, and unless all said lands shall be sold before that time, when it shall be in the power of the Governor to discontinue the office," &c.

The term of office was thus fixed at two years by the statute creating the office; and the Executive has followed the letter of the statute in the commission issued to the respondent on the 14th February, 1852. Having qualified under that commission, the respondent acquired a right to hold the office, with all its emoluments, for the period of two years from the said date, unless removed in due course of law.

But the relator contends that the adoption of the present State Constitution, in November, 1852, had the effect of dissolving the whole frame of government which existed under the antecedent State Constitution; that those holding office under the former constitution would have been of necessity ousted, and the offices themselves annulled, had it not been for the insertion of a schedule designed to continue them in existence provisionally, until another organization could be perfected under the new constitution; and this merely for the purpose of preventing the anarchy which would have otherwise resulted.

This argument necessarily directs our attention to the schedule of the Constitution of 1852. There are eight articles in that schedule, of which only two require to be examined in connection with the present subject.

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"Article 143. All rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution and not inconsistent therewith, shall continue as if the same had not been adopted.

"Article 144. In order that no inconvenience may result to the public service from the taking effect of this constitution, no office shall be superseded thereby; but the laws of the State, relative to the duties of the several officers, executive, judicial and military, shall remain in full force, though the same be contrary to this constitution, and the several duties shall be performed by the respective officers of the State, according to the existing laws, until the organization of the government under this constitution, and the entering into office of the new officers to be appointed under said government, and no longer."

These two articles of the Constitution of 1852 are not inconsistent. They must, therefore, be construed in reference to each other. If anything in the one should be found ambiguous or obscure, we are permitted to search in the other for such light as it will afford, to dispel the obscurity.

The argument of the counsel for the relator may be fairly and briefly stated as follows: "Article 144 declares that the respective officers of the State shall continue to perform the duties of their respective offices, until the entering into office of officers appointed by the government, organized under the present constitution, *and no longer*. The emphatic words *and no longer*, create a tenure of office applicable to all offices existing in the State at the time of the adoption of the constitution, and whether mentioned in that instrument or not. If the holders of such offices were not *ipso facto* displaced by the adoption of the new constitution, it was (in the words of article 144,) 'that no inconvenience might result to the public service.' But the constitution contemplated that the new government should have the appointing power, fully and universally, untrammelled by any previous appointments, or by the term of office specified in any previous Act of the Legislature, or commission granted under the same."

In the application of article 144 of the constitution to the present case, the relator contends that, inasmuch as he has been appointed Register of the Land Office by the government organized under this constitution, and has taken the oath of office prescribed by the constitution, it results that the respondent is *no longer* qualified to discharge the duties of said office, notwithstanding his commission is not yet expired, by its terms.

It is true, as contended by the relator, that the words of article 144 are general enough to include every office in the State, whether mentioned in the constitution or not; and the construction, contended for by him, would probably be entitled to our assent, were it not for the provisions of the article 143, which, as I think, have restricted the operation of article 144.

All rights of individuals, and all laws in force at the time of the adoption of the constitution of 1852, not inconsistent therewith, continue as if the same had not been adopted. The Act of 1844 contains nothing, that I can discover, inconsistent with the constitution of 1852. It has declared that the Register of the Land Office shall hold his office for the term of two years. That statute is in full force. The respondent has been appointed under that statute. His term of two years has not expired. He had a right to receive its emoluments.

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That right has been guaranteed to him by article 148; for his office is not one of those mentioned in the constitution, and of which the tenure was, in terms, altered by that instrument. Had it been such a one, his right to the office must have succumbed under the paramount requirements of that constitution. I feel bound to construe the two articles 148 and 144 in such a manner as to give effect to both, if that be possible. The conclusion to which that rule of construction has led my mind is, that the appointing power of the government organized under the constitution of 1852, is to be exercised with reference to pre-existing laws and to rights acquired by individuals under pre-existing laws, in all cases where such laws and such rights are not inconsistent with the constitution itself.

I cannot concur, to its full extent, in the view taken by the relator of the effect of the promulgation of the new constitution of Louisiana in the place of the old one, which was abrogated; namely, that without some saving clause it would have dissolved the whole frame of government and the obligation of laws previously enacted. Such results belong to revolution, the offspring of intestine commotion, or of foreign conquest, which changes the allegiance of a nation, substituting monarchy, or oligarchy, for democracy, or *vice versa*—or which reduces an independent State into a subject province. They have nothing in common with the peaceful changes, so frequent in their occurrence, which the combined republics of our political confederation find it expedient from time to time to introduce into the details of administration of a government always essentially the same, because it always recognizes the same source of authority—the people.

Within the last eight years the State of Louisiana has made two of these administrative changes; and we all remember the particular objects for which, on both occasions, the Conventions which remodelled the Constitution, were called together. In 1845, the main ends proposed were universal suffrage, and the restriction of the legislative power in the relation to the chartering of Banks. In 1852, the popular voice demanded an elective judiciary, and a more extended system of internal improvements. The important objects indicated, formed prominent features of the Constitution as remodelled on both occasions; and the articles 148 and 144 of the present Constitution are copied *totidem verbis* from articles 142 and 144 of the Constitution of 1845. The inference I draw from these articles, thus repeated, is directly the reverse of the doctrine which lies at the foundation of the relator's argument. The changes introduced by those Constitutions into our body politic, were not revolutionary. The sanction of the law, the rights of persons, were only disturbed in those cases and to that extent that the Constitution contained declarations inconsistent with particular statutes or particular rights.

These views are in accordance with the construction given by our predecessors to the Constitution of 1845, in the case of *The State v. Percy*, 5th Annual, 290.

The researches of the relator have furnished us with proof that similar saving clauses have been introduced into every amended State Constitution that has been framed throughout the Union: but I have seen no precedent for the construction which he seeks to give to that clause in our own constitution.

I am of opinion that the judgment of the District Court should be reversed, and that the mandamus should be refused.

VOORHIES, J. I concur in the opinion of Justice BUCHANAN.

DECREE.

A majority of the Judges being of opinion that the judgment should be affirmed,

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs.

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JOHN CORBETT v. M. COSTELLO et al.

Action on a written contract, leasing "the ground floor of the brick building on the corner of Lafayette and New Levee streets," &c. The answer set up, that all the premises leased were not delivered. Parole evidence was admitted "of the acts and declarations of the defendant showing that the apartment occupied by him was the only part of the ground floor to which he was entitled under the contract, according to the understanding of the parties." To the admission of this evidence a Bill of Exceptions was taken. *By the Court*: The objection to the admissibility of the evidence is not tenable. The Code of Practice, art. 339, provides: "when the defendant in his answer alleges, on his part, new facts, these shall be considered as denied by the plaintiff—therefore neither replication nor rejoinder shall be admitted." Under this provision it was perfectly competent for the plaintiff to show in what manner the delivery of the property had been effected, particularly as the defendant had put the matter at issue by his answer.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Dorsey*, for plaintiff. *Collins*, for defendants and appellants.

VOORHIES, J. This is a suit instituted by the plaintiff to recover rent on the following written contract of lease, viz:

"Know all men by these presents, that *John Corbett* doethere by lease unto *Martin Costello* the ground floor of the three story brick building on the corner of *Lafayette and New Levee Streets*, for the full term of three years from the 1st day of October, 1852, to the 1st day of November, 1855. The conditions of this lease are, that the said *Martin Costello* shall punctually pay, or cause to be paid, unto the lessor or his legal representatives, the annual rent of eight hundred dollars, payable monthly, and at the expiration of this lease deliver said premises to said lessor in the same good order and condition in which he received them, the ordinary wear and tear and other unavoidable causes excepted. It is also a condition of this lease that the said lessee shall make all repairs at his own cost and expense, and comply with all police regulations."

The only ground of defence set up is, that the lessor has failed and refused to deliver to the lessee possession of the whole premises according to the terms of the contract, the lessor having kept possession of the greatest portion of said premises, thereby compelling the lessee to withdraw entirely from the property leased.

It is contended by the defendant, that he was entitled, under the contract, to the whole ground floor of the building therein described, extending in length 117 feet from Fulton to New Levee street, by 23 feet in width, one of the side lines of which bounding on Lafayette street. It appears that the plaintiff was the lessee of this property under *B. Rodriguez*, for which he paid an annual rent of \$2500, and that he afterwards divided the ground floor into three separate apartments, one of which, on the corner of *Lafayette and New Levee streets*, he contends, constituted the subject of the contract of lease in question.

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The ground floor had not yet been partitioned when the contract between the parties was signed. But it appears that the defendant himself marked off that part of it which he designed to occupy under the contract, and took possession thereof after the partition was erected. It appears he objected at first to the size of the apartment thus allotted to him, but afterwards acquiesced and accepted it, and occupied it during the space of two or three months as a hardware store. During the whole of that time it is not shown that he ever complained of the non-execution of the contract on the part of the plaintiff, or that he was entitled, under it, to any thing beyond the ground floor of the apartment on the corner of *Lafayette and New Levee streets*. When on the eve of leaving it, he stated to one of the witnesses, "that things were not going as he expected, and that he had concluded he would go back to the former store he had rented from *Mr. Peters*." His claim to the whole ground floor of the building was asserted only since the institution of the present suit.

On the trial, a bill of exceptions was taken by the defendant to the ruling of the District Court, in admitting the testimony of witnesses to prove the declarations of the defendant and his acts, showing that the apartment occupied by him was the only part of the ground floor to which he was entitled under the contract, according to the understanding of the parties. The objection to its admissibility was placed on the ground, that it varied the written contract and diminished thereby the plaintiff's obligations under it. It was also objected to on the ground, that it contradicted the allegations contained in the plaintiff's petition, which were admitted by the answer; and also because no ground had been laid in the pleadings to authorize it. The plaintiff's demand is limited to the contract sued upon, which is substantially set forth in his petition. We do not consider the objection to the admissibility of such evidence under the pleadings, tenable. The Code of practice, article 329, provides: "When the defendant in his answer alleges, on his part, new facts, these shall be considered as denied by the plaintiff, therefore, neither replication nor rejoinder shall be admitted." Under this provision, it was perfectly competent for the plaintiff to show in what manner the delivery of the property had been effected, particularly as the defendant had put the matter at issue by his answer.

We assume as correct the proposition of the defendant's counsel, that parole evidence is not admissible to contradict, alter, or vary a written instrument when entered into by the agreement of the parties. For, in the first instance, parties generally make their contracts verbally, and afterwards commit them to writing, and the presumption is that they only write what they deem material. In such a case, the verbal contract being merged in the writing, it is clear that the writing cannot be contradicted, though it may be explained if ambiguous. Our rule upon this subject is substantially the same as that of the Common Law, that parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. There appears to be no difference in the interpretation given to it both by the Civil and Common Law Courts. In alluding to the rule, *Greenleaf* says: "The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead. The duty of the Court, in such cases, is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the

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meaning of the words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument, in its operation, to the established rules of law." Applying these principles to the question presented in the present case, we are unable to discover in what respect the testimony objected to, either contradicts, alters, or varies the written instrument declared upon: no other words are added to it, nor substituted in its stead. But the object of the testimony in this case was not to contradict, alter, or vary the written instrument, but resorted to for the purpose of ascertaining the nature and extent of the subject to which it referred. "Evidence which is calculated to explain the subject of an instrument, is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, *when considered relatively*, different from that which it would receive *if considered in the abstract*." In the present case, there is some obscurity in relation to the character, or extent of the subject of the contract; the property leased is described to be at the *corner of Lafayette and New Levee streets*. This would seem to exclude that part of the ground floor at the corner of Lafayette and Fulton streets.

In the case of *D'Aquin v. Barbour*, 4 An. 441, our predecessors held, "that parole evidence was admissible to show the *nature and extent* of premises leased by an act *sous seing privé*, when from the indefinite language of the instrument, it was necessary to ascertain the intention of the parties. Where the intention of the parties is doubtful, the manner in which a contract has been executed by one with the assent of the other, will determine the construction to be put upon it." In the case of *Squier v. Stockton*, 5 An. 743, the leading rule laid down by *Greenleaf*, (1 Green. No. 286,) as to the admissibility of parole evidence to ascertain the nature and character of the subject of contracts, is fully recognized. We are, therefore, of opinion that the testimony was properly admitted by the District Court.

It is also urged by the defendant, that the judgment of the District Court is erroneous, in condemning him to pay three years' rent, as he is only bound for a monthly tenancy. The judgment appears to us to be clearly in accordance with the terms of the contract.

It is, therefore, decreed, that the judgment of the District Court be affirmed, with costs.

ELI WHITNEY v. WM. H. BUNNELL.

Action against the acceptor of a Bill payable to the order of the drawer, who endorsed it to the plaintiff. The signature of the endorser was proved by a comparison of it with that of the drawer. The Court considered the evidence sufficient—as the acceptance admitted the signature of the drawer.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Wolfe & Singleton*, for plaintiff. *Semmes & Edwards*, for defendant and appellant.

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BUCHANAN, J. The defendant and appellant was acceptor of a bill drawn by *J. Richards*, to the order of himself, and by him endorsed to plaintiff.

The plaintiff gave in evidence the bill and acceptance, and proved the endorsement of the payee by a comparison, made by sworn experts, of the two signatures "*J. Richards*" at the bottom and on the back of the bill. The experts pronounced the two signatures to have been made by the same person.

In this Court the appellant contends that this was not a case for comparison of handwriting by experts: the legal effect of the acceptance being, not so much an admission of the signature of the drawer, as an estoppel to deny the genuineness of that signature, which would preclude the acceptor from showing that the said signature was forged, even if that were a fact.

Story, in his Comm. on the Law of Bills of Exchange, paragraphs 262, 411, and 412, lays down the law on this point as follows: "The acceptance admits the genuineness of the signature of the drawer; and consequently, in favor of a *bona fide* holder for value without notice, if the signature of the drawer turn out to be a forgery, the acceptance will nevertheless be binding, and entitle such holder to recover thereon according to its tenor." "But it is said that the like doctrine does not apply to the acceptor, in the case of the forgery of the signature of the payee, or of any other endorser, because the acceptor is not presumed to know their signatures or to vouch for their genuineness."—"Neither does the acceptance admit the signature of the drawer when he is an endorser also, altho' the bill is payable to the drawer's order, and his signature as drawer is admitted." For this doctrine Story cites the authority of *Robinson v. Yarrow*, 7th Taunton, 455, in which it was said by *Parke, Justice*—"The mere acceptance proves the drawing, but it never proves the endorsement." And *Parke* quotes *Smith v. Chester*, 1st Term Reports, 654, as deciding that, even if the endorsement be there, the acceptance does not admit the endorser's handwriting, and that the acceptor is only bound to look at the face of the bill. *Judge Story* remarks upon these cases, that the distinction is certainly very nice, and perhaps does not stand upon very satisfactory ground, where the endorsement is on the bill at the time of acceptance.

But in the case at bar we are relieved of the perplexity of this nice distinction; for here, the plaintiff did not rest his cause upon the presumptions arising from the defendant's acceptance of the bill—as was done in the case in Taunton. On the contrary, he administered proof of the signature of the payee—the proof by comparison with a signature admitted by the acceptance, according to *Story*—proved by the acceptance, according to *Parke*. And here it is proper to remark, that the authorities do not countenance the doctrine of estoppel contended for by the appellant. We have found nothing which precluded defendant from pleading and proving forgery of the signature of the drawer of the bill against the plaintiff, had the facts been so. And upon such proof made, it would have been incumbent upon plaintiff to show that he was a *bona fide* holder for value, without notice, before he could recover.

Upon the proof by experts, founded on comparison of signatures, see the case of *Sauvé v. Dawson*, 2 Martin, 218.

Judgment of the District Court affirmed, with costs.

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JAMES McMASTERS v. LUCIUS H. PLACE.

The Act of 1820, which provides that any person who takes possession of a vacant estate, or part thereof, without being duly authorized to that effect, &c., is not applicable to the heir of an estate who has the right, if he chooses, to take possession of the estate, and dispose of it as he pleases, subject only to the legal restraint of the creditors, and under the responsibility of paying the debts of the succession.

The sale of property belonging to an estate to which the seller has a simulated title, and the appropriation of the price to his own use—is such an acceptance of the succession as makes him liable as heir for the debts.

Article 965 of the Code is a negative, pregnant with the affirmative, that if the heir had no title to the property sold by him other than that of heir, and no right to suppose that the property did not belong to the succession, he commits an act manifesting the intention to accept when he disposes of the property. A simulated title confers no right whatever.

APPEAL from the Second District Court of New Orleans, *Lea, J. E. C. Miz, and Bonford*, for plaintiff. *Benjamin & Micou*, for defendant and appellant.

OGDEN, J. It is sought in this action to render the defendant liable for a debt of his brother, *Ransom L. Place*, deceased, on the ground that he was the sole heir of his brother, and had, after his death, intermeddled with the affairs and sold the property of the succession. The defence is a general, as well as a special denial of the plaintiff's allegations, and the averment that defendant had, by notarial act, renounced his brother's estate: The Court below rendered a judgment against the defendant, based on the Act of the Legislature of 1820, which declares that any person who takes possession of a vacant estate, or part thereof, without being duly authorized to that effect, with the intent to convert the same to his own use, shall be prosecuted by information, and on conviction thereof shall be fined \$2000, to the benefit of the estate, and shall be moreover liable to pay all the debts of the estate. We think this statute is not applicable to the heir of an estate who has the right, if he chooses, to take possession of the estate and dispose of it as he pleases, subject only to legal restraint by the creditors, and under the responsibility of paying the debts of the succession. According to that statute, if a stranger to the succession should possess himself of the estate and convert it to his own use without authority, the consequence of a conviction, in a criminal proceeding, would be to render him liable for all the debts of the estate, but in regard to the heir, a criminal prosecution could not lie, because by law he is seized of the estate, and becomes the lawful possessor whenever, under the responsibilities of heir, he enters into the possession. The case, therefore, turns on the question whether the defendant has rendered himself liable by doing some act which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir. If he has done any such act, the article 982, of the Civil Code, expressly renders him liable. Art. 984 says: it is necessary the intention should be united to the fact, or rather manifested by the fact, in order that the acceptance be inferred. Art. 993 declares, that the sale of the least article of property belonging to the succession will render the person called to the succession irrevocably the heir, unless he cause himself to be authorized by the Judge to make the sale at public auction on a petition alleging the necessity for it. When *Ransom H. Place* died he was the lessee and manager of the American Theatre. He died on the 2d of November, 1850, at the

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defendant's house, and up to that time was apparently in possession, as lessee of the Theatre, of the scenery, machinery, wardrobe and other property appurtenant to the Theatre. A few days after his death, to wit, on the 12th November, 1852, the defendant sold all the movables in the Theatre to *Mandell* and *Charles*, to whom, with defendant's consent if not by his procurement, the owners of the Theatre transferred the lease of *Ransom Place*, having yet several years to run. The defendant endeavors to establish that the property belonged to himself and not to his brother's succession. We agree with the Judge below that the title set up by him must be considered a simulation. The property was owned by *Ransom Place* in 1845, when it was seized at the suit of one of his creditors, and adjudicated to the defendant, *L. H. Place* and *S. P. Stickney*, but the deed recites that the notes of *Ransom H. Place* and *Stickney* were given for the price of the adjudication. *Ransom Place* continued in possession of the property after the adjudication. As the defendant neither paid nor bound himself to pay the price, and the possession continued in *Ransom Place* as before the sale, although under a lease from the defendant, there was in reality no change of title as regards the half of it adjudicated to the defendant—the sheriff's deed can only be viewed as a means resorted to of placing the title of the property in the name of defendant to protect it from the pursuit of *Ransom Place's* creditors. The sale being simulated, the question arises whether the act of selling the property and converting the proceeds to his own use, constitutes an acceptance of the succession by the defendant so as to render him liable as heir for the debts. We differ from our brother Judge in his conclusions on this point. Although the intention is required to be united to the fact, it is clear from the phraseology of article 984 referred to, that the fact may be taken as manifesting the intention—the sale, as we have seen, of the least article of property belonging to the succession without the authority of the Judge, is one of those facts which manifests the intention to accept—but it is contended that the fact here did not manifest the intention to accept, because the defendant sold the property in his own right and not in the capacity of heir, and we have been favored with the views of several of the French commentators on provisions of the Napoleon Code similar to our own. Those authorities only go to this extent, that where a person has some title, or supposes he has a right to the property by a title other than that of heir, the disposal of the property by him is not a fact manifesting the intention to accept. This is in accordance with our Code, which has even declared it in express terms. See art. 985. But we consider it a negative pregnant with the affirmative, that if the heir has no title other than that of heir and no right to suppose that the property did not belong to the succession, then he does commit an act manifesting the intention to accept when he disposes of the property. A simulated title confers no right whatever. No action is necessary to annul it because it is a nullity in itself—and if a person, called to a succession without any other right than that derived from a simulated title, disposes of property belonging to the succession, he renders himself liable as heir. As heir he had the right to sell, and the law will presume that he sold in that capacity only in which he could have supposed he had any right to the property. It is objected that the petition contains no allegation by which the defendant could be rendered liable as having had only a simulated title to the property disposed of. It was not necessary, in our opinion, to make this allegation in order to sustain the plaintiff's action.

It is, therefore ordered, adjudged and decreed, that the judgment of the Court below be affirmed, the costs of this appeal to be paid by the defendant appellant.

Re-hearing refused.

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ELLEN HARRIS v. JAMES B. HAYS—CATHARINE GUENTHER,
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It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without the means of reviewing the case, and the appeal will be dismissed.

A PPEAL from the Second District Court of New Orleans, *Lea, J. J. Q. Bradford*, for plaintiff and appellant. *C. M. Bradford*, for defendant. *Wm. H. Hunt*, for warrantor.

CAMPBELL, J. This is a petitory action, instituted by the plaintiff, *J. B. Hays*, for the recovery of a slave, with damages for his wrongful detention. The defendant filed a general denial, calling in warranty his vendor, *Mrs. Curoline G. Hoffman*. The warrantor interposed, among other exceptions, that of *lis pendens*, which was sustained and the suit dismissed; from which judgment the plaintiff has appealed.

We are unable to reverse this judgment, inasmuch as the record contains no part of the evidence on which it was rendered, notwithstanding the certificate of the clerk that it is a complete transcript of all the documents filed, of all the evidence adduced, and of all the proceedings had on the trial."

Under this state of the case we would feel bound to reverse the judgment if the record itself did not disclose the fact that evidence was adduced on the trial, and the consequent falsity of the certificate. That the error in the certificate resulted from inadvertence we are willing to believe, yet we deem it proper at the same time to express our disapprobation of the inexcusable negligence of the officer who granted it.

It may further be remarked that the plaintiff has offered no explanation of the fact of his having filed a record, which, though certified to be complete, appears by his own averments, contained in his application for a new trial, to be imperfect—being content, as it would seem, to rest his hopes for a reversal of the judgment, on an irregularity, not of his opponent, but imputable rather to himself. He cannot profit by his own wrong. It was his duty to bring up the evidence on which the case was tried. Not having done so, the Court has not the means of reversing the judgment appealed from; but must presume that it was rightly rendered, and on sufficient evidence.

The appeal is, therefore, dismissed at the costs of the appellant.

Re-hearing refused.

THE STATE *v.* THE JUDGE OF THE FIFTH DISTRICT COURT.

SLIDELL, C. J. After the order was made and signed, granting a suspensive appeal and approving the bond furnished by the appellant, we think the jurisdiction of the District Court was incompetent to disturb the order. See *Pemberton v. Zacharie*, 4 Louisiana, 205.

It is, therefore, ordered, &c., that a writ of prohibition issue in this case, as prayed for in the petition.

JOHN WINTHROP *v.* STEPHEN JARVIS.

An executor may bind himself individually for a debt of the succession; and where the promise is made to pay the debt at a specified time, it is not merely an acknowledgment of the debt, but is a contract which may be enforced against him individually, although the promise be made by him in an instrument in which he describes himself as executor.

Defendant pleaded certain claims in reconvention, but evidence in support of them was excluded, on the ground that they were not connected with plaintiff's demand. *By the Court.*—We think it should have been distinctly alleged in the reconventional plea that the obligation signed by defendant was the result of a general settlement which was intended to embrace all debts and accounts between the parties. The evidence was, therefore, properly excluded.

APPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Joseph*, for plaintiff. *Durant & Horner*, for defendant and appellant.

SLIDELL, C. J. The obligation, upon which the suit is brought, is an express promise on the part of the defendant to pay to the plaintiff the total of certain amounts acknowledged to be due to him by the defendant individually and as executor of *N. Jarvis*. The exception that the suit for that portion of the amount which was due by the succession of *Nathan Jarvis* should have been instituted against the defendant, as executor, was properly overruled. An executor may bind himself individually for a debt of the succession, and where the promise is made to pay the debt at a specified time, it is not merely an acknowledgment of the debt, but it is a contract which may be enforced against him individually, although the promise be made by him in an instrument in which he describes himself as executor.

The defendant pleaded certain claims in reconvention, but evidence in support of them was excluded upon the objection that they were not connected with the plaintiff's demand.

We think it should have been distinctly alleged in the reconventional plea, that the obligation signed by the defendant was the result of a general settlement, which was intended to embrace all debts and accounts between the parties. For want of such averment, we think the District Judge did not err in refusing to receive testimony in support of the reconventional demand.

The defendant will not be precluded from bringing his action upon the claims alleged in his plea.

Judgment affirmed, with costs.

VOORHIES, J., BUCHANAN, J., and CAMPBELL, J., concurred with SLIDELL, C. J.

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JARVIS.

OGDEN, J. (dissenting.) I consider the defence to be, substantially, that the obligation sued on was the result of a settlement of mutual accounts between the parties, designed to embrace all their respective claims, and that through error the obligation was executed for a larger amount than was due to the plaintiff, in consequence of the omission of two items of indebtedness on the part of the plaintiff, which were unknown to defendant at the time of the settlement. The claims on both sides were equally liquidated and demandable previous to the execution of the obligation, and the compensation, to the extent of the mutual indebtedness of the parties to each other, took effect *ipso jure*. An obligation given through error for a debt already extinguished by legal compensation may, in my opinion, be resisted by a plea in reconvention, without violating the principle which requires, that the reconventional demand should be incidental to or connected with the principal demand—being a defence to the action, it is necessarily connected with the plaintiff's demand.

For these reasons I have not been able to concur fully in the opinion just had.

JOHN W. ROLLINS v. JEROME WATSON—ELLIOT, Intervenor.

Intervenor, as agent of one *Crane*, a creditor of *Watson*, received two horses from *Watson*, with the understanding that Intervenor should sell them, and if the horses sold for more than *Crane's* claim, the surplus should be paid to *Watson*—if for less, *Watson* should make up the deficit. On an attachment against *Watson*, the horses were seized, and the Intervenor claimed them as his property. *By the Court*.—It cannot be held that the Intervenor owned the horses either by sale, or *dation en paiement*, there being no price—no sufficient consideration to sustain such a transfer. Nor yet can he be regarded as pledgee—for the delivery not being accompanied by an act either in public form, or under private signature, did not invest him with the right of causing his debt to be satisfied by preference.

APPEAL from the Second District Court of New Orleans, *Lea, J. Thomas Hunton*, for plaintiff. *Upton*, for appellant.

CAMPBELL, J. On the 3d January, 1853, plaintiff instituted suit by attachment against the defendant, *Jerome Watson*. Under the writ issued in this case, certain horses were attached, two of which the intervenor, *Joseph Elliot*, claimed by third opposition, as his property, by virtue of a transfer from defendant, made December 31—the horses having been, as he alleges, taken from his possession after their delivery. The third opponent further claimed damages and obtained an injunction inhibiting the sale of the horses thus seized. The property attached having been sold, the proceeds of the sale remain in the hands of the Sheriff, subject to the claims of the respective parties.

A rule was taken by the plaintiff on the intervenor to show cause why the injunction should not be dissolved, to which exceptions were filed but subsequently withdrawn, and, by consent of parties, the merits of the case, involving the ownership of the property attached, were tried upon the rule.

Judgment was rendered dismissing the intervention and dissolving the injunction, with damages; from which judgment the intervenor has appealed.

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WATSON.

On the trial the intervenor failed to establish his title to the property attached, and from the testimony of the witnesses, it would seem that he held it as mandatory, rather than as owner.

It appears that the intervenor, as agent of one *Crane*, a creditor of the defendant, received from him the horses in question, agreeing, in the language of the witness, to "take and sell them and apply the proceeds to pay *Crane's* debts; and if there was any surplus, to pay it over to *Watson*; if not, *Watson* would pay the difference." This debt, (the consideration of the alleged transfer,) was evidenced by a note then and yet in the possession of *Elliot*, he never having delivered it to defendant. It was produced by him at the trial, and one of the witnesses, *Edgell*, deposes that, after the sale, intervenor stated that the horses had been placed in his hands for sale, and that he had no interest in them—that if he did not succeed in the suit, he still held the note.

Under these circumstances it cannot be held that the intervenor owned the horses either by sale, or *dation en paiement*, there being no price—no sufficient consideration to sustain such a transfer. Nor yet can he be regarded as pledgee; for the delivery not being accompanied by an act, either in public form, or under private signature, did not invest him with the right of causing his debt to be satisfied in preference. C. C., art. 3124-5; Session Acts, 1852, p. 15, sec. 2. The intervenor might, perhaps, under the agreement, have sold the horses and imputed the price to the payment of the debt due him; but this he would have done as agent, for until the sale and delivery, the ownership remained in the defendant, and the object continued subject to seizure for his debts.

Judgment affirmed.

L. A. PELLERIN v. J. C. LEVOIS et al.

By the Court: When the record comes up without the evidence, nothing can be assigned as error in the Supreme Court that could have been cured by evidence in the Court below.

The defendant, in injunction, is under no obligation to have the evidence taken down in writing for the use of his adversary—in case the latter should wish the appeal.

APPEAL from the Second District Court of New Orleans, *Lee, J. Schmidt*, for plaintiff and appellant. *Benjamin & Micou*, for defendant.

CAMPBELL, J. On the petition of the appellant, *L. A. Pellerin*, a writ of injunction issued from the Second District Court of New Orleans, April 15, 1852, inhibiting *J. C. Levois*, the appellee, and the Sheriff, from proceeding further in the execution of a writ of seizure and sale, issued in the suit of *J. C. Levois v. Pellerin*. On the 22d April, the defendant obtained a rule on plaintiff to show cause why the injunction should not be dissolved, on the ground that the writ issued in the case was a second writ, issued on a petition containing the same allegations, the first injunction having been dissolved by a judgment of said Court, which judgment was, on appeal, affirmed by the Supreme Court.

We are unable to revise the judgment complained of, as the transcript does not show the grounds on which the first injunction was dissolved. The appellant has failed to bring up the evidence, or a certificate, in relation to it, and it is well settled that when the record comes up without the evidence, nothing

can be assigned as error which could have been cured by evidence in the Court below. The defendant, in injunction, was under no obligation to have the evidence taken down in writing for the use of his adversary, in case he should wish to appeal.

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Under the circumstances, we must infer that the District Judge had before him evidence sufficient to sustain the judgment.

Mollin v. Thompson, 9 M. R. 275. *Miller v. Whittier*, 6 L. 72. *Cox v. Bethany*, 10 L. 154. *Fowler v. Smith*, 1 R. 448.

The appeal is, therefore, dismissed at the costs of appellant.

Schmidt, for a re-hearing:

As it appears to the undersigned that the opinion delivered in the above cause is predicated upon an *error of fact*, it becomes his duty to apply for a re-hearing, for the following causes and reasons:

First. *Because it is a mistake to suppose that the record does not contain all the evidence on which the cause was tried in the lower Court.*

The Court say, "That they cannot review the judgment complained of, as the transcript does not show the grounds on which the first injunction was dissolved."

Such a knowledge is no doubt requisite to the decision of the cause; but the Court will not, it is presumed, punish the appellant for the omission to furnish that evidence, unless the omission be attributable to his fault or neglect.

The appellant is bound to furnish a correct transcript of all the evidence and proceedings of the inferior Court, in the cause in which he appeals. If he has done this, he has performed his duty; and to require more, would be to exact something which the law does not authorize.

The Court further say, "The appellant has failed to bring up the evidence, or a certificate in relation to it; and it is well settled, that when a record comes up without the evidence, nothing can be assigned as error which could have been cured by evidence in the Court below."

The conclusion is indisputable, if the fact from which it is deduced be true; but *that fact has no existence; ergo*, the conclusion is not applicable in this cause.

The appellant has brought up *all the evidence on which the cause was tried below*, and this appears *conclusively* from the record in the Supreme Court.

The certificate of the clerk declares that the record contains *all the documents and all the proceedings* had on the trial of the rule, &c. It does not assert, *his verbis*, that it contains *all the evidence*, since it is evident from the record that *no evidence whatever* was offered.

Gentlemen so familiar with the practice of the District Courts as the members of the Supreme Court, need not be told that the *introduction* of evidence, whether *oral or written*, is a *proceeding* in the cause; and that the record, containing *all the proceedings*, must necessarily show whether any evidence was offered, and by whom. This is a formality which is never omitted by the clerk, because the law allows him compensation for swearing witnesses and registering documents; and, where the record makes no mention of the offering of evidence by either party, it is *morally certain* that none was offered.

If any evidence was offered on the trial below, it must be conceded that such evidence was either verbal or documentary; it could not have been *documentary*, because all the documents are in the record; and it could not have been *verbal*, because if a witness had been introduced, mention of it would have been made among the proceedings. Fairly, to come to any other conclusion, appears to the undersigned impossible.

Should there, however, still remain the shadow of a doubt on the subject, it must vanish upon looking at the entry on p. 11 of the record, where the clerk declares, that "*after argument of counsel*," the cause was submitted.

If the Court will take the trouble to examine the various records in their archives, they will find that the clerk invariably, when proof is offered, says, "*after hearing evidence and argument of counsel*," and no minute clerk would omit to mention the production of evidence, if it had been produced.

Presumptions, in opposition to the usual and regular manifestation of a series of facts, are entitled to no weight, and lead to no safe or probable conclusions. They should be disregarded, as mere vague conjectures; and, as the presump-

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tion in this case is, that if evidence had been adduced, mention would have been made of it somewhere; the Court must conclude, in conformity with the truth, that the evidence wanted to enable it to decide the cause, and which should have been furnished in the lower Court by defendants, was never offered.

That this is true, was not denied by the counsel of the appellee, on the argument of the cause, and he attempted to show that its production was unnecessary, because the records of a Court were always open for the inspection of the Judge of the Court who might refer to them, although not in evidence in a case like the present, where the object was simply a comparison of two petitions. Had the fact been as the Court suppose, it is not to be doubted that he would have insisted on the dismissal of the suit on that ground, but he did not even pretend to do so, for the obvious reason that the record was complete.

There is another fact connected with the record in this cause, of which the Court is unquestionably ignorant, and which forbids the appellee from availing himself of any defect or incorrectness of the Record. It is this, viz: the record in this cause was brought up and filed by *the appellee himself*. It appears, that the appellee, apprehensive that if he waited for the return day of the appeal, he might be frustrated in his expectations of having it tried at the term at which it was made returnable, caused the record to be made out *and filed it himself in this Court*. If he, therefore, has filed an incomplete record, it is *his fault, not ours*, and it would not be just or equitable to let him profit by his own wrong. This would be a *fraud on plaintiff*, which we are sure the respectable counsel of defendant would scorn to perpetrate, and of which they would not avail themselves, even if the Court were disposed to sanction it—a thing not supposable.

Second. *It is respectfully insisted, that by no possible ingenuity of the human mind can it be fairly or logically inferred in this cause, that the judge had before him evidence sufficient to sustain the judgment.*

The rule taken on plaintiff was to show cause, why the injunction should not be set aside, because one exactly similar had already been dissolved.

All the Court can possibly presume in favor of the judgment is, that the plaintiff in the rule sustained his allegation by proof. The next inquiry is, therefore, what species of proof? written, of course, since, in order to prove that one piece of writing is exactly similar to another, both must be produced. But a piece of writing is a *document*, and all the documents on which the cause was tried are in the record, and to presume the contrary is to presume that the clerk has certified to a *falsehood*. No Court would be justified in going this length in sustaining a judgment of any Court.

The reasoning of the Court in the judgment under consideration being, therefore, based on the supposed existence of a fact, which *never had an existence*; and upon the presumed production of a document which *never was produced*, unless the Clerk of the inferior Court *deliberately certified to a falsehood*; it is respectfully asked that a re-hearing be rewarded.

Had it been hinted on the argument of the cause that doubts existed as to the completeness of the record, the undersigned would then have shown, as he has now had the honor to do:

1st. That a fair and attentive examination of the proceedings in the inferior Court, and the certificate of the clerk, necessarily lead to the conviction that the record is complete, and contains all the evidence on which the cause was tried below.

2d. That if the record, or the certificate of the clerk, be incomplete, it is not the fault of appellant, but of the appellee, who brought up and filed the record as a complete transcript of all the proceedings in the inferior Court, and who cannot avail himself of his own wrong to appellant's prejudice; nor will the Court punish appellant for the fault of the appellee.

The undersigned regrets the necessity which forces him to occupy the valuable time of the Court in examining again a question that has already engaged its attention. He thinks himself, however, fully justified in so doing by the considerations above set forth, and being persuaded that the Court will take pleasure in correcting any error into which they may have inadvertently fallen, he has the honor, respectfully, to submit the preceding observations.

SLIDELL, C. J., (on the re-hearing.) It is ordered, adjudged and decreed that the judgment rendered by this Court, in this case, on the 6th of June last, remain undisturbed.

DANIEL KENNEDY v. THOMAS HYNES.

Damages allowed for a frivolous appeal.

A PPEAL from the Fifth District Court of New Orleans, *Buchanan, J. Bright,* for appellee. No counsel appeared for defendant and appellant.

VOORHIES, J. The defendant is appellant from a judgment rendered against him on a promissory note. The general issue is the only defence set up by him.

There is no assignment of errors on the face of the record, and we have not been able to discover any other grounds for the appeal than that for delay.

The appellee prays that the judgment be affirmed, with damages, on the ground that the appeal is frivolous. Under the provisions of Article 907 of the Code of Practice, we think his prayer should be allowed.

It is, therefore, decreed that the judgment of the District Court be affirmed, with five per cent. damages on the sum of eighteen hundred and seventy three dollars and sixty cents, amount of the note sued upon, to wit: ninety-three dollars and sixty-five cents, and costs of suit in both Courts.

MOSES LEVY and A. SCAVERS v. ELIZABETH WEBER and JEAN
TOURNER.

Where an amended petition, which changed materially the action, was never served on the defendant, and its allegations never put at issue—it will not be considered as constituting any part of the pleadings.

In suits instituted by plaintiffs against one *Weber*, an attachment was levied on a lot and buildings in possession of defendants. Defendants intervened, and claimed the property, by purchase, from *Weber*. Plaintiffs answered that the sale to defendants was fraudulent and simulated. Judgment was rendered in favor of plaintiffs for the amount of their claims, "with privilege on the property attached." Execution was issued, and from the Sheriff's return it appeared that the property attached was adjudicated to the plaintiffs. Defendants refused to give up the property, and this action was brought for property.

By the Court: It does not appear that either of the defendants was ever notified of the sale, and as the plaintiffs allege, they have continued to occupy the premises since the sale. It must be conceded that the proceedings in those suits were exceedingly loose and irregular. There is nothing in the record which shows that the claim of the intervenor was adjudicated upon, or that it was abandoned; neither does it appear that the intervenor had any knowledge of the judgment rendered against her vendor, recognizing the attaching creditor's privilege on the property. In the absence of such proof, and in view of all the circumstances disclosed by the record, it is clear that the rights of the intervenor must stand unaffected. So thought the District Judge, for his judgment was chiefly based on the ground that the plaintiffs were bound to resort to the revocatory action.

A PPEAL from the District Court, Third District, Parish of Jefferson, *Clarke, J. Jourdan*, for plaintiffs and appellants. *Dufour*, for defendants.

VOORHIES, J. The plaintiffs allege that they purchased a certain lot of ground and buildings, situated in the Faubourg Delassise, Parish of Jefferson, at a Sheriff's sale on the 28th of February, 1852; and that the defendants having occupied said property since that time, although requested, have refused to pay rent, and to remove from the same; whereupon, they pray that the defendants be ejected from the said property, and decreed to pay them one hundred dollars damages.

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WEBER.

The defendant, *Elizabeth Weber*, avers that she purchased the property in dispute, *bona fide*, from *Peter Weber*, by notarial act, on the 5th of March, 1851, and afterwards, on the 10th of July, 1851, conveyed one undivided half thereof to her co-defendant, *Jean Journée*, for a valuable consideration. Both of the defendants aver that they have been in the uninterrupted possession of said property from the date of their respective conveyances.

It appears that the plaintiffs, in a supplemental petition, attacked the conveyances set up by the defendants, on the ground of fraud and simulation. But as it does not appear that that amendment, though material, as it altered the plaintiff's demand, was ever served on the defendants, or put at issue, it is clear that it cannot be considered as constituting any part of the pleadings in this action. The plaintiffs' right of action must, therefore, rest on the legality of the title under which they claim.

It appears that in a suit instituted by *Moses Levy*, one of the plaintiffs, against *Peter Weber*, a writ of attachment was levied on the property in dispute. The defendant, *Elizabeth Weber*, intervened in that suit, by way of third opposition, and claimed the sameby purchase from *Peter Weber*, on the 5th of March, 1851. *Moses Levy* answered the third opposition, by pleading a general denial, and averring that the property attached belonged to *Peter Miller*; that the pretended sale set up by the intervenor, if any such existed, being made on the eve of the absconding of *Peter Miller*, of which the intervenor had knowledge, was fraudulent, collusive and void; that it was a mere simulation, and if not such, the price was far beneath the value of said property. On the trial of that case, it appears that the only judgment rendered, was a judgment in favor of *Moses Levy* against *Peter Weber*, for the amount of his claim, "with privilege on the property attached."

A second attachment suit was instituted by *A. Searers*, the other plaintiff, against *Peter Weber*, in which the pleadings and judgment appear to be substantially similar to those in the other case. An execution was issued on the judgment in the former case. From the return of the Sheriff on it, it appears that the property in dispute was adjudicated to the plaintiffs on the 28th of February, 1852, at a coffee-house, at the corner of Rousseau and Philip streets, where the sale was advertised to take place. It does not appear that either of the defendants was ever notified of it; and, as the plaintiffs allege, they have continued to occupy the premises since that sale.

It must be conceded that the proceedings in those suits were exceeding loose and irregular. There is nothing in the record which shows that the claim of the intervenor was ever adjudicated upon, or that it was abandoned. Neither does it appear that the intervenor ever had any knowledge of the judgments rendered against her vendor, recognizing the attaching creditor's privilege on the property. In the absence of such proof, and in view of all the circumstances disclosed by the record, it is clear that the rights of the intervenor must stand unaffected. So thought the District Judge, for his judgment was chiefly based on the ground that the plaintiffs were bound to resort to a revocatory action.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs.

SLIDELL, C. J. I have not examined the merits of this cause, being of opinion that the motion to dismiss, made by the appellee in this case, should prevail, the transcript being incomplete. See *Guillart v. Marcelline*, 7 Annual, p. 442.

JUNIUS AMIS et al. v. BANK OF KENTUCKY.

Upon the dissolution of an injunction, which arrests the execution of a judgment, the judgment creditor is only entitled to interest to the date of the dissolution.

A PPEAL from the Fourth District Court of New Orleans, *Reynolds, J. Thos. N. Pierce*, for plaintiff. *Stockton & Steele*, for defendant and appellant.

VOORHIES, J. The defendant obtained a judgment against *Theophilus Freeman*, for the sum of \$1236, with five per cent. interest per annum on \$1225, from the 30th of January, 1844, until paid. A writ of *fieri facias* was issued on this judgment and levied on two negroes, as the property of *Freeman*. The plaintiff claimed the ownership of the negroes, and enjoined the sale. The judgment dissolving his injunction condemned him to pay the defendant "twenty per cent. damages, and eight per cent. interest, from the 27th of June, 1848, on the amount of the judgment enjoined, to wit: \$1236, and five per cent. from the 30th of January, 1844, on \$1225, &c." On this judgment an execution was issued, directed to the Sheriff of the Parish of Madison, which was also enjoined. On its dissolution, the plaintiff, and his sureties on the bond, were condemned, *in solido*, to pay the defendant the sum of \$193 44, as damages, and eight per cent. interest on \$967 44, from the 12th of June, 1850, until paid.

On the 19th of January, 1852, *Hill, McLean & Co.* paid \$1584 16, as the amount purported to be due on both judgments in the injunction cases, and were, by reason thereof, specially subrogated to all the rights of the defendant.

Afterwards, the plaintiff and subrogees took a rule on the defendant and *Robert Mott*, attorney of record, to show cause why the sum of \$630, alleged to have been overpaid by them in error, should not be reimbursed.

From the judgment rendered in favor of the plaintiff and subrogees, making the rule absolute for the sum of \$858 89, the defendant in the rule appealed.

The appellees also complain of an error in the judgment to their prejudice, and ask us in their answer to amend it so as to allow them the sum of \$708.

We consider both judgments in the injunction cases as final and conclusive between the parties. The correctness of the adjustment made between them under those judgments, by the Court below, is, therefore, the only matter into which we can inquire. We think the damages and eight per cent. interest were properly allowed on the amount due, on the judgment enjoined, including interest to the 27th June, 1848, to wit: \$1505, but that the Court below erred in computing the interest from that day to the 19th of January, 1852, when the payment was made. As the judgment was silent on the subject, the interest should have been computed to the date of the dissolution of the injunction, to wit: the 10th of April, 1849. In *Brown v. Congot*, 8 R. 17, where a similar question was involved, it was held, in relation to third persons, that the party was only entitled to interest up to the date of the dissolution of the injunction, as at that time he would be at liberty to proceed with his execution.

As to the other injunction, the damages and interest allowed by the judgment are clearly specified, and admit of no doubt.

In relation to the claim set up by the appellant, for costs incurred in the original suit against *Freeman*, for the custody of the negroes under seizure during the pendency of the injunction suit, we concur in opinion with the Court below,

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that it was a matter for special damages, which should have been set up and proved on the trial of the injunction suit.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower Court be amended so as to allow the plaintiffs and appellees the sum of five hundred and eighty-six dollars and seventy-two cents, and that, so amended, it be affirmed, with costs in both Courts.

CHRISTOPHE COLOMB et al. v. GEORGE W. JONES et al.

F., the tutor of a minor, purchased, at a judicial sale, a slave belonging to the minor, and the widow in community. The widow approved of the purchase. Afterwards F. was removed from the tutorship, his account homologated—and R., being appointed in his stead, was authorized by the Court to receive the price of the sale. *Held*:—This judgment was, by implication, a judicial approval of the sale, and the Probate Court was competent to sanction it. It may well have been considered by the Probate Judge advantageous for the minors that their new tutor should take the value of the slave in money, rather than bring a suit against F. to rescind the sale.

It seems, from the phraseology of Article 2189 of the Civil Code, that a minor injured by a violation of its provisions, or his tutor under judicial sanction, may waive the penalty which it establishes, and claim indemnity for the loss.

A PPEAL from the District Court, Fifth District, Parish of Assumption, *Randall, J. C. A. Johnson*, for plaintiffs. *Raby*, for defendants and appellants.

Rost, J. (SLIDELL, J., dissenting.) This is an hypothecary action.

In 1849 the plaintiffs instituted an action against *Raphael Molere*, alleging that he had been their tutor, and claiming from him the proceeds of the successions of their father and mother. *Molere* admitted the tutorship and his indebtedness, and judgment was rendered against him for the amount claimed and interest, with mortgage on all his property, to take effect from the 15th of August, 1840.

Molere was, at that time, the owner of a tract of land which he sold on the 26th. December, 1842, to *Edmond Slattery*, under whom the defendants hold. The plaintiffs alleging these facts, and the insolvency of *Molere*, seek to enforce their legal mortgage on this land.

The defendants deny the existence of the mortgage, and that *Raphael Molere* ever was the tutor of plaintiffs. They allege that in 1839 *François Molere* was duly appointed their tutor, and gave bond, and that he has never been deprived of the tutorship, or otherwise superseded.

They further allege that while acting as tutor of the plaintiffs, and administering the succession of their father, as such, he became the purchaser of the entire property of said succession; that this sale was a nullity, which the plaintiffs cannot now ratify to the prejudice of third persons; they, finally, allege that the judgment against *Raphael Molere* is fraudulent and collusive. There was judgment against them, subjecting the land to the plaintiffs' mortgage, and they appealed.

The plaintiffs have established, by satisfactory evidence, that *François Molere* had received the sums for which they have obtained judgment against him. It is true that no judgment can, at this time, be found depriving *François Molere* of the tutorship, but his declaration is of record in the Court of Probates, in answer to a petition presented for his removal, that he was insolvent, and had no objection to be removed. The Judge might well have considered this

as a resignation, authorizing him to cause another tutor to be appointed, and as *François Molere* subsequently rendered his account in Court, was discharged as tutor, and the legal mortgage existing on his property raised, it is manifest that if he was not removed, he consented to be superseded, or, in other words, resigned.

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It is next contended that *Raphael Molere* was never appointed tutor; it is shown that he acted as such under the supervision, and, at times, under the order of the Court of Probates. The letters of tutorship are found, although the judgment appointing him is not. We cannot doubt that he was tutor, but whether he was or not is immaterial. After *François Molere* had been discharged, he, *Raphael Molere*, received funds belonging to the minors in right of their mother, while he was still the owner of the land in dispute, and whether as tutor, or as intermeddler, a legal mortgage attached upon it in favor of the plaintiffs at least to the amount thus received.

The property, composing the succession of their father, was all purchased by *François Molere*, while he was tutor, and it is shown that he paid over to *Raphael Molere* the price for which he was bound. The plaintiffs sued the latter in affirmance of the sale, and the judgment rendered in their favor was in part for that price.

The sale to *François Molere* was a nullity, and when the minors became of age, their title to the property thus sold was unimpaired. They chose, however, to ratify the sale by suing for the price in 1849, seven years after the land of the defendants had gone out of the possession of *Raphael Molere*, and the only remaining question in the case, is, whether this ratification reverts back to the date of the sale to *François Molere*, or whether it is itself a new title, taking effect from its date only. In the case of *Mercier v. Canonge*, the Court held that where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale, and claim the price from their tutor, to the prejudice of other creditors of the latter. 12th Robinson, 885.

The principle of this decision is applicable to the present case. The nullity resulting from the illegal purchase of the minor's property, is of the same character as that resulting from the illegal sale of it, and should have no greater legal effects.

The French commentators seem to agree that, although nullities of this description may be ratified, their ratification has no retro-active effect; that it derives all its force from the act of ratification, and produces legal effects only from the date of that act. It is viewed by them as a new title, to be executed independently of the first; and rights acquired by third persons, since the void act, but before the ratification, are in no manner affected by it. 7 Toullier, 557, 568. 30 Duranton, pp. 525 et seq.

Under this view of the law which we adopt, the plaintiffs have no legal mortgage on the land of the defendants, for the proceeds of the succession of their father. The judgment must, therefore, be reversed.

It is, therefore, ordered that the judgment in this case be reversed.

It is, further, ordered that the legal mortgage of the plaintiffs be recognized to the amount of \$107 81, with legal interest, from the 30th August, 1840, until paid.

It is further ordered that in default of payment of said sum and interest, the land described in the petition be seized and sold to pay them. It is further

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ordered that the costs of the District Court be paid by the defendants, and those of the appeal by the plaintiffs.

A re-hearing having been applied for and granted, the judgment of the Court was pronounced by

SLIDELL, C. J. I was unable to concur when a judgment was rendered by the former Supreme Court, refusing to recognize a tacit mortgage in favor of the plaintiffs on the land of the defendants, for the proceeds of the succession of their father. A re-hearing was granted, and the subject remaining undetermined by our predecessors, is now to be adjudged by this Court.

My views remain unchanged, and I will briefly state my reasons.

The conclusions of *Mr. Justice Rost*, who was the organ of a majority of the Court, appears to rest upon the following propositions: That the purchase of the slave in 1829 at the probate sale, by *François Molere*, then tutor of the minors, was a nullity, and when the minors came of age, their title to the property was unimpaired. That, although they chose to ratify the sale in 1849, by suing *Raphael Molere*, their second tutor, for the price which he had collected in 1840, this ratification could not retroact to the prejudice of *Slattery*, who bought from *Raphael* in 1842 the land which, under mesne conveyances, the defendants now hold.

Under the circumstances of the case, I am not prepared to treat the purchase of the slave, by *François*, as a nullity at the time when *Raphael* sold his land to *Slattery*. The proper consideration of the subject requires a preliminary statement of the material facts.

The plaintiffs are the children of *Celestin Molere* and *Artemise Breaux*. In the fall of 1829 *Celestin* died. In November, 1829, upon the petition of the mother, who declared her unwillingness to accept the tutorship, *François Molere* was appointed tutor of the two minors, *Ermina* and *Joseph*, and *Raphael Molere* was appointed curator of the third minor, then unborn. In December, 1829, under an order of the Court of Probates, the slave and a plough, the only property in which *Celestin's* succession had any interest, were sold by the Probate Judge, and *François*, the tutor, became the purchaser. The price of the plough was \$4, cash; of the slave \$1090, payable in three equal instalments in March, 1831, 1832, 1833. This property is described in the probate proceedings "as property belonging to the community which existed between *Celestin Molere* and his wife *Artemise Breaux*." In 1831 *Mrs. Molere* brought suit against *François*, to have him removed from the tutorship, by reason of his alleged unfitness for the office, and neglect of the interest of the minors. In her petition, she remarks upon the invalidity of his purchase, but elects to ratify it, and claims from him her share of the price as widow in community. This particular suit does not appear to have been prosecuted. But it is shown, satisfactorily to my mind, that *François Molere* afterwards consented to be removed; that *Raphael Molere* was appointed tutor in 1840; that *François* rendered an account to the Probate Judge of the nett proceeds of his purchase; that the account was judicially approved, the money received in three years by *Raphael*, and *François* discharged.

At the time of the probate sale, *Mrs. Molere*, the surviving widow, had a half interest in the property sold, subject, it is true, to the debts of the community, which were quite insignificant. I think there is reason to believe she was acquainted with the fact of the purchase by *François*, and at all events she expressly approved it, in 1831, and claimed her share of the price from him. Now

it is clear, *quoad* her interest in the slave and his price, that the plaintiffs must claim through the mother, and stand in her stead. And it seems to me it cannot be said that in 1840, after *Mrs. Molere's* death, when *Raphael*, the new tutor, settled with *François* for the price of the property, the entire sale of that property was a nullity, and he had no right to receive any part of the money.

I am, moreover, not prepared to say that the sale could be treated in 1842 as a nullity, even as to the interest of *Celestin*, which was inherited from him by his minor children. For, it must be observed, that the judgment in 1840, which homologated the account rendered by *François*, and authorized *Raphael* to receive the price of the slave, was, by implication, a judicial approval of the sale, and of the receipt of its proceeds by *Raphael*, two years before *Slattery*, under whom the defendants claim, contracted with *Raphael*. I do not think it was incompetent for the Probate Court to sanction the sale, as it did by the decree in 1840. It may well have been considered by the Probate Judge advantageous for the minors that their new tutor should take the value of the slave in money, rather than bring a suit against *François* to rescind the sale, and get back the slave. Such an action, be it observed, it would have been impossible to maintain, for more than the undivided moiety of the slave, since *Mrs. Molere* had ratified the sale as to her interest, and her heirs could exercise with respect to that interest no greater rights than their mother.

I think the power of the Probate Court to sanction the receipt of the price of the invalid sale, is aided by a consideration of the peculiar phraseology of the Article 1139 of the Code, which the defendants invoke to defeat the plaintiffs. It is true the Article says: "Every curator of vacant successions, or of absent heirs, is prohibited from purchasing by himself, or by means of a third person, any property, movable or immovable, intrusted to his administration;" but it adds: "under pain of nullity (sous peine de nullité,) and responsibility for all damages caused thereby." May not the injured party, or his tutor for him, under judicial sanction, elect to waive the penalty, and say to the illegal purchaser, the property was taken from the estate by your illegal acts; indemnify the estate for its loss. It was well argued by counsel that no more equitable measure of that indemnity could be adopted as against *François*, than the value he himself had set upon it; nor should third persons complain, for his interest as the purchaser to get it as low as possible, is a reasonable assurance that its value was not collusively enhanced.

Let us suppose, however, for the purpose of argument only, what I am not prepared to concede, that a Court having jurisdiction over the property of the minors could not by such a decree, under such circumstances, conclusively affirm the sale. There is another view of the subject, which may solve the present question.

He who becomes a tutor of minors, becomes answerable for the faithful management of their affairs. This responsibility is guaranteed by a tacit mortgage of the tutor's property in favor of the minors, dating from his appointment. The language of the Code is broad. The tutor shall administer the minor's estate as a prudent administrator (*bon père de famille*) would do, and shall be responsible for all damages resulting from a bad administration. Article 327. The property of the tutor is tacitly mortgaged in favor of the minors from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it. Art. 354.

As soon as *Raphael* was appointed tutor, it was clearly his duty to do one of two things—either to sue for the rescision of the sale, or to collect the price—

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If the former, his duty has been neglected, and the interests of the minors have suffered. There is no injustice, under that theory, and under the evidence in the cause, in assuming that the minors have been damnified to the amount of the slave's value, by the tutor's neglect. If, on the contrary, it was lawful for him, under the sanction of the decree, to adopt the sale and collect the price, the responsibility of *Raphael* to account for it to the minors, attached at the date of its receipt, and that responsibility was secured by the tacit mortgage.

I am, therefore, unable to perceive how the action of the plaintiffs is to fail, under which ever view we regard the second tutor's duty.

However sensibly we may appreciate the hardship of our system of tacit mortgages, its remedy is not a matter within our province. The Code gives a minor that security for the faithful administration of his property, and it is our duty to enforce it. It is not, however, improper to observe that the present case is, in a great degree, divested of the hardships usually incident to that enforcement, by the fact of knowledge of the dangers they were about to incur on the part of the defendants, and those purchasers through whom they derive title.

I think the former judgment of the Supreme Court should be reversed, and the judgment of the District Court affirmed.

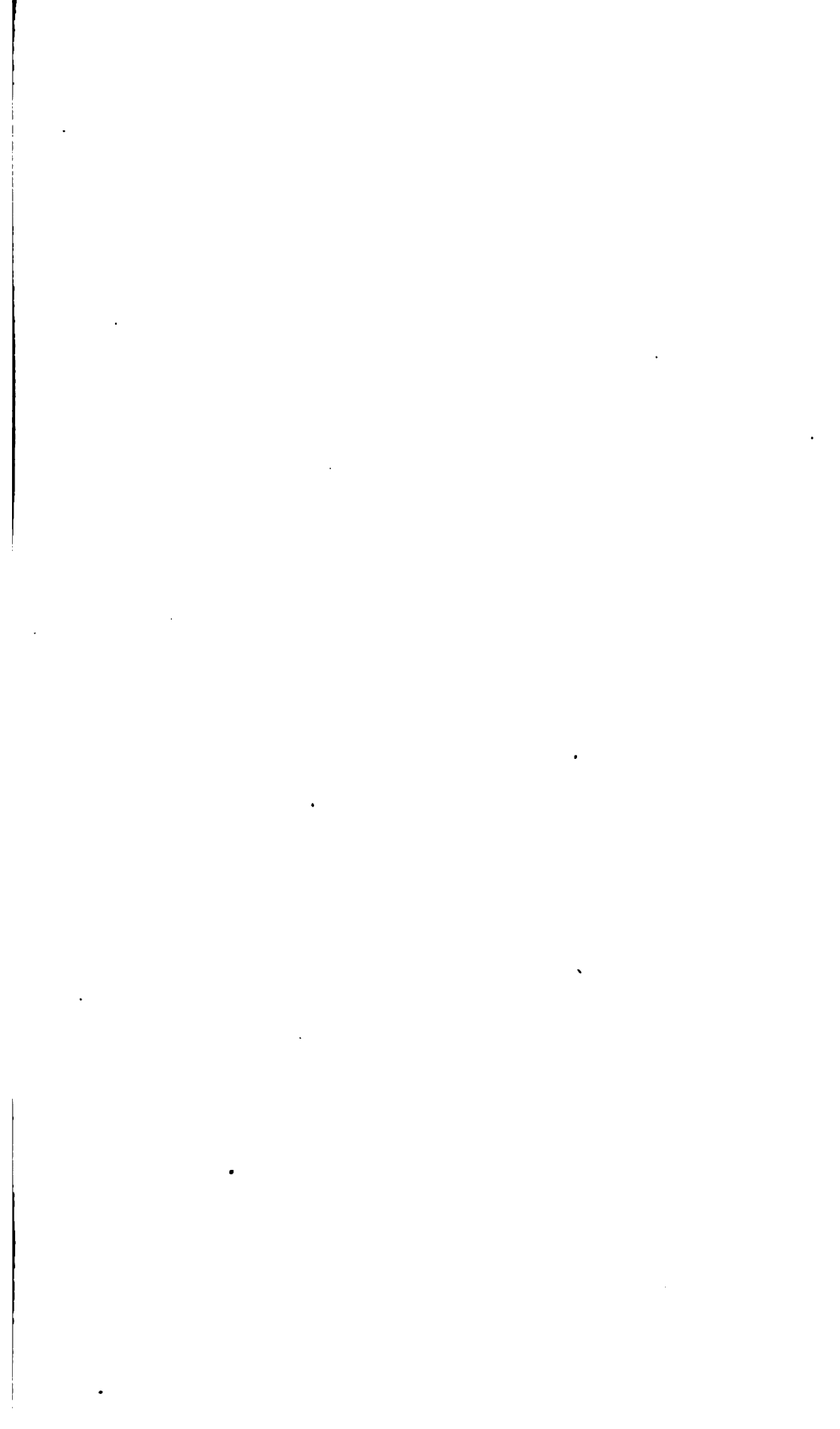
All the Judges concurring, it is, therefore, decreed that the judgment heretofore rendered by the Supreme Court in this cause be set aside; and it is further decreed that the judgment of the District Court be affirmed, with costs.

BUCHANAN, J. In the case of *Mercier v. Canonge*, 12 Robinson, 385, it was held that when a slave, inherited by minors, had been illegally sold by their tutor, the minors will not be allowed to ratify the sale to the prejudice of other creditors of the tutor.

This doctrine appears to me sound in law, and consonant to equity. Creditors, and I will add purchasers, without notice, ought to be protected against such ratifications.

But the present case differs from that of *Mercier v. Canonge* in this: that the defendants are purchasers, with notice of the claim of plaintiffs against *Raphael Molere*, for the price of their slave, illegally sold by *François Mollere*. This notice is patent upon the title of defendants to the land, against which plaintiffs seek to exercise their tacit mortgage.

It is this peculiar feature of this cause, which induces me to concur in the affirmation of the judgment of the District Court.



C A S E S
 ARGUED AND DETERMINED
 IN THE
 SUPREME COURT OF LOUISIANA,
 AT
 OPELOUSAS,
 IN
 SEPTEMBER 1853.

PRESENT.

HON. THOMAS SLIDELL, *Chief Justice.*

HON. C. VOORHIES,
 HON. A. M. BUCHANAN, } *Associate Justices.*
 HON. A. N. OGDEN,

CAMPBELL, J., was absent during this term.

PECK & LYMAN v. HENRY C. DWIGHT.

One bound for the claim sued on, in any event, is a competent witness.

APPEAL from the District Court, Parish of St. Mary, *Nicholls, J. Olivier*, for plaintiffs and appellants. *Gibbon*, for defendant.

OGDEN, J. I think this case should be remanded, with directions to the Court below to receive the testimony of *William Sharp*. The objection made to his testimony, on the ground of interest, in my opinion, cannot be sustained. He swears against his own interest by fixing upon himself the liability for the plaintiff's claim, so that he will be bound, in any event, to pay the amount in controversy. I do not see how he could be made liable for the costs of the present suit, no matter in which way it is decided. If judgment should be rendered against *Dwight*, it would be impossible for *Dwight* to recover the costs of this suit from *Sharp*, on the ground that it was a debt for which *Dwight* was the security of *Sharp*, because *Dwight* and *Sharp* have, by their declarations, denied such a relation between them to have existed, and the plaintiff has neither alleged or offered to prove any such fact. The action is based upon an alleged advance made by them to *Dwight*, and the only question is whether the advance was intended to be made to *Dwight* or *Sharp*. The fact that at the time of making the advance, a special guarantee was taken by the plaintiffs from *Dwight*, that the sugar and molasses should be shipped to their house by *Hord*, and that it was expressly stipulated in the guarantee, that if the sugar and molasses should be lost or damaged on the voyage, *Dwight* should not be responsible, is a reason for requiring explanation of the whole transaction. The authorities cited by the plaintiffs' counsel do not apply to the circumstances of this case, and the case ought to be remanded for a new trial.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be reversed, and the case remanded, with directions to the Judge to receive the testimony of *William Sharp*; and it is further ordered that the costs of this appeal be paid by the defendant.

SLIDELL, C. J., and BUCHANAN, J., concurred with OGDEN, J.

VOORHIES, J., dissenting. The plaintiffs' demand is based on the following circumstances. In January, 1850, *Thomas Hord* purchased of *William Sharp* a sugar estate on certain terms and conditions, stipulating, among other things, to deliver, in payment of the price, to the order of his vendor, two-thirds of each crop of sugar and molasses to be made by him on said estate for six consecutive years, the balance of the price, after the expiration of that time, to be paid in full. On the 25th of January, 1851, *Hord* shipped one hundred and sixteen hogsheads of sugar, eighty-four tierces of molasses, and four tierces of cistern bottom to the plaintiffs, merchants of New York, to be sold for his account, instructing them to place the net proceeds thereof to the credit of *Sharp*, except one-third of the molasses and cistern bottom, which he reserved for himself. The day previous to the shipment, *Hord* drew the following order in favor of *Sharp* on *Lyman*, one of the plaintiffs: "*Mr. N. E. Lyman* will please pay *Wm. Sharp*, or order, the proceeds of one hundred and sixteen hogsheads of sugar and two thirds of the proceeds of eighty-four tierces molasses and four tierces of cistern bottom, and oblige, &c." On the 25th of January, 1851, the day after, the following endorsement was made on it: "*Pay* the proceeds of the within sugar and molasses to *H. C. Dwight*, or order," and signed by *Sharp*. On this assignment the defendant procured from the plaintiffs an advance of \$6500. The proceeds of the consignment having fallen short to meet the amount of the advance, the balance resulting in favor of the plaintiffs constitutes the subject matter in dispute.

The receipt of the defendant is in these words: "Received, Franklin, Jan'y 25th, 1851, from *Peck & Lyman*, *N. E. Lyman's* draft on the said *Peck & Lyman*, at one day's sight, for six thousand, two hundred and fifty dollars; also *N. E. Lyman's* check on Canal & Bank'g Co., New Orleans, for two hundred and fifty dollars, in all six thousand and five hundred dollars, as an advance on account of a shipment made to them by *Thomas Hord*, and in accordance with an agreement signed by me and dated this day; the said *Hord* having given an order for a portion of the proceeds of the said shipment to *Wm. Sharp* and the said order being endorsed to me, the said sum has been received on said order and is to be credited on the same." The defendant gave a guarantee to the plaintiffs that the sugar, molasses and cistern bottom should be shipped as stipulated by *Hord* to them; its obligations extend no farther.

From this state of facts it is clear that the defendant is liable to the plaintiffs for the balance resulting after allowing the proceeds of the consignment as a credit. But it is urged by the defendant that the plaintiffs must fail in this action, as they have failed to establish the correctness of the accounts of sales. From the nature of the transaction between all these parties, it is manifest that the defendant cannot question the correctness of those accounts. *Hord* alone can be affected by it: the net proceeds, whatever the amount may be, are to be applied in part payment of the price of his purchase. Besides, the deposition of *Hord* shows that he considered the accounts of sales correct, copies of which are filed in connection with his testimony.

In relation to the bill of exceptions taken to the opinion of the Judge excluding the deposition of *Sharp* on the score of interest, it is immaterial to consider it; it cannot vary or contradict the written contract between the parties in the absence of any allegations of error, surprise, or fraud.

I am, therefore, of opinion the plaintiffs ought to have judgment against the defendant.

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SUCCESSION OF F. GAUTIER.

The commission to which an administrator is entitled is two and a half per cent. upon the amount of the inventory, deducting bad debts. C. C. 1062.

It is not necessary, under the provisions of the Act of 1852, chap. 805, that a judgment by default should precede a judgment homologating an administrator's account, rendered by the Clerk of the District Court.

A PPEAL from the District Court, Parish of Lafayette. *Crow & Girard*, for administrator. *Mouton*, for opponents and appellants.

BUCHANAN, J. Three creditors of this estate have appealed from a judgment of homologation of a tableau of distribution rendered by the clerk of the District Court of Lafayette.

The appellee (the administrator of the estate) asks us to dismiss the appeal, on the ground that the claims of the appellants, singly, do not equal the constitutional amount requisite to give this Court jurisdiction.

But by the admission of the administrator himself, in his tableau, the claim of one of the appellants, *Eleazur Pret*, exceeds three hundred dollars. As all the appellants have joined in one appeal, and as no point is raised in argument which is not common to all of them, it is immaterial to examine the amount of the claims of the other two appellants, or to decide whether, in a controversy respecting the distribution of funds, the amount of the fund to be distributed, or the amount of single claims, is the standard of the jurisdiction of this Court.

There was no opposition to the administrator's account filed in the Court below, but the appellants rely for a reversal of the judgment upon errors apparent on the face of the record.

The account is very loosely drawn. It commences with the following item, being the only one to the credit of the estate:

"Amount of sales which, when collected, will be the active mass, \$3800 00."

Under the head of privileged debts is the following item:

"Administrator's commission, \$190 00."

The appellants have especially directed our attention to this item, which is just 5 per cent. upon what figures in the tableau, as "the active mass."

The commission to which an administrator is entitled is two and a half per cent. upon the amount of the inventory of the estate administered, after deducting bad debts. C. C. 1062.

It is possible that the commission charged in the account does not exceed the amount allowed by law, but the record does not show that such is the case.

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In other respects this account is very vague and unsatisfactory. Many of the items of "privileged debts" declare the names of the creditors, but not the nature of the claims. Others mention the nature of the claim, but not the name of the creditor. For instance, there is an item, "Attorney's fees, \$100." Now, the attorneys of record are *Crow & Girard*, of which firm we understand the administrator to be a member. It appears to us that this item, particularly, should have stated the name of the claimant, in order to enable us to judge of the legality of the claim.

We remark, also, that the account makes no mention of the place of residence of any of the creditors, as required by article 1168 of the Civil Code.

We think that justice requires we should open the judgment of homologation.

There is a point of practice, raised by the appellants, upon which it is proper that we should express an opinion.

It is not necessary, under the provisions of the Act of 1852, chap. 305, that a judgment by default should precede a judgment of homologation of an administrator's account, rendered by the Clerk of a District Court.

It is, therefore, adjudged and decreed, that the judgment of homologation, appealed from, be reversed, and that this cause be remanded for further proceedings according to law—the costs of appeal to be borne by the succession.

EDWARD P. DWIGHT, Adm'r, &c., v. E. J. & W. P. KEMPER.

Suit on a note expressing that it was given for a fee in a certain cause. The Court held that evidence going to show that the note was given for other considerations than those specified on the face of it, was properly rejected.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Walker*, for plaintiff. *J. B. Lea*, for defendant and appellant.

SLIDELL, C. J. This suit is upon a note signed by the defendants, and also upon an account for professional services in certain enumerated causes.

It is expressed in the note that it is given for the fee of *Mr. Dwight* in a certain cause of which the title is therein set forth. At the trial of the cause witnesses were offered to show that, in fact, the note was not merely for *Mr. Dwight's* fee in the cause specified in the note, but also embraced professional services in other suits, being a portion of those charged in the account. We think this testimony was properly rejected. This is quite different from showing by parole the consideration of a note which, on its face, specifies none; and it is proper to observe that there was no allegation, nor offer of proof of fraud or mistake, in the confecton of the instrument.

The other matters, discussed in argument by the appellants, involve questions of fact. Were we acting originally upon the case we might perhaps have allowed a few dollars less than the District Judge awarded, but, upon a review of the whole case, we are not able to say that injustice has been done, or that there is any error authorizing a reversal.

Judgment affirmed, with costs.

SAMUEL R. BELL *v.* GEORGE ELLIOTT.

Suit on a promissory note. Plea, prescription. Plaintiff had brought suit previously; was called and not appearing, was nonsuited. *By the Court:* In such a case, at least when unexplained, the Article 3485, C. C. applies, and the interruption is considered as not having occurred.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Brent & Baker and Maskell*, for plaintiff and appellant. *J. B. Lea*, for defendant.

SLIDELL, C. J. The note is prescribed unless prescription has been interrupted. The only interruption asserted is the former suit against the defendant upon the same note. But the plaintiff then was called and not appearing, was nonsuited. In such a case, at least when unexplained, the Article 3485, C. C., applies, and the interruption is considered as not having occurred. There is an attempt to explain the plaintiff's failure to appear, but it is loose and defective. It does not appear that the plaintiff had used diligence, or was taken by surprise.

Judgment affirmed, with costs.

 EVARISTE DEGUIR *v.* L. A. VEAZEY et al.

The prescription of one year, established by Article 1939 of the Code, is not applicable to simulated sales.

The prescription of ten years, established by Article 3442 of the Code, requires good faith in the purchaser.

In an action to annul a simulated sale, the prayer of the petition was, that the property be "sold in satisfaction of petitioner's judgment;" but the judgment decreed the property "subject to the just claims of his (defendant's) creditors." An amendment of the decree was asked for so as to make it correspond with the prayer. *By the Court:* The appellee is entitled to the amendment. The Code of Louisiana contemplates that the revocatory action shall enure to the benefit of the creditor who has been at the expense and risk of prosecuting the action, (C. C. 1972,) and although we do not regard the present action as coming within the restrictions and limitations applicable to the *Actio Pauliana*, or *revocatoria*, yet there is certainly that analogy which the greater bears to the less; and the practice of our predecessors has been in conformity with the prayer of plaintiff's petition.

APPEAL from the District Court, Parish of St. Martin, *Voorhies, J. L. Simon*, for plaintiff. *Nicholls*, for defendant and appellant.

BUCHANAN, J. The petition sets forth that plaintiff is a creditor of *Lewis A. Veazey*, in the sum of four hundred and sixteen dollars and sixty-six cents, with interest, by judgment; that said *L. A. Veazey* has no property in possession; but that *Theophile Veazey* claims to be the owner of certain property described in the petition, by virtue of a notarial act, dated the 29th September, 1836; which act plaintiff avers to be false, fraudulent and simulated, made for the purpose of defeating the just claims of the creditors of *L. A. Veazey*, who figured in the said act as vendor of the property in question. The plaintiff prays that *L. A. Veazey* and *Theophile Veazey* be cited, and for judgment annulling the notarial sale above mentioned, decreeing the property to belong to

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L. A. Veazey, and to be subject to seizure in execution of plaintiff's judgment aforesaid.

The petition was filed in 1849. Subsequently one of the defendants, *L. A. Veazey*, died, and the suit was revived against his widow and heirs. In 1853, issue was joined, and the parties went to trial. Judgment being rendered in favor of plaintiff, the defendant, *Theophile Veazey*, has appealed.

The evidence establishes that the sale by *L. A. Veazey* to his brother, the appellant, of three lots, with the houses thereupon, in St. Martinsville, on the 29th September, 1836, was a simulation. The proof of this fact results from the letters of the appellant himself, and from a counter letter signed by him. The latter document is in these words :

"Je certifie que la vente de la propriété signée par mon frère à mon nom en 1836, est qu'une vente pour garantir la dite propriété de tous ses créanciers.
THEOPHILE VEAZEY."

The defendant, *Theophile Veazey*, has pleaded the prescription of one and ten years in bar of this action.

The one year's prescription relied upon, is that mentioned in the 1989th article of the Civil Code. But it has been frequently held by our predecessors, and the doctrine meets with our entire concurrence, that the prescription of one year, created by that Article, is not applicable to actions to avoid a simulated sale. The language of the leading case upon this point, which is reported, *Cammack et al. v. Watson et al*, 1st Annual, p. 132, is as follows: "The Code provides for the avoidance of *contracts*. It has no reference to *simulated* or *pretended* agreements." And again: "There is no similarity between the revocatory action provided for in our Code, and the action to have a simulated sale decreed to be so. As *Merlin* says: On se pourvoit contre un acte simulé, par une simple demande à ce qu'il soit déclaré tel. Rep. de Jurispr. *verbo Simulation*."

See also 1 Ann. 262; 3 Ann. 627; 4 Ann. 86; 5 Ann. 400; 13 La. 129; 9 Rob. 267, *in note*.

The other prescription pleaded, viz: that of ten years, is not applicable to this case. Property is acquired by ten years possession, according to the Civil Code, articles 3442 and following, provided among other things, that the original acquisition has been in good faith. But this indispensable basis of the prescription of ten years is manifestly wanting in the present instance, as shown by the counter letter signed by the appellant. Besides which, the appellant has failed to prove the ten years actual and continuous possession, which is no less essential. C. C. 3445, 3453.

There is a variation between the prayer of the petition and the decree of the District Court, to which our attention has been called by the counsel of the appellee, and in respect to which the appellee's answer filed requests the amendment of the judgment.

The petition prays that the property described be decreed "subject to be seized and sold in satisfaction of petitioner's debt," meaning his judgment against *Lewis A. Veazey*. The judgment rendered herein decrees the property "subject to the just claims of his (*Lewis A. Veazey's*) creditors."

We think the appellee entitled to the amendment. The Code of Louisiana contemplates that the revocatory action shall enure to the benefit of the creditor who has been at the expense and risk of prosecuting the action, (C. C. art. 1972 :) and, although we do not regard the present action as coming within the

restrictions and limitations applicable to the *actio Pauliana*, or *revocatoria*, yet there is certainly that analogy which the greater bears to the less; and the practice of our predecessors has been in conformity to the prayer of the plaintiff's petition. See 1st Ann. 132, &c. It is not improper to observe that no other creditor of *Veazey* than the plaintiff has intervened in this suit.

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It is, therefore, adjudged and decreed, that the judgment of the District Court be amended; that the sale of the property described in plaintiff's petition from *Lewis A. Veazey* to *Theophile Veazey*, by act before *Pierre Paul Briant*, notary public, on the 29th September, 1836, be avoided and annulled as false and simulated; that the property mentioned in said act be decreed still to belong to the estate of *Lewis A. Veazey*, and subject to be seized and sold in satisfaction of the judgment heretofore obtained by plaintiff against said *Lewis A. Veazey*; and that the appellant, *Theophile Veazey*, be liable *in solido* with the other defendants, for the costs of the Court of the first instance, and solely for the costs of this Court.

HEIRS OF REINE TRAHAN v. MICHEL TRAHAN et al.

Action by collateral heirs of the wife to set aside an act emancipating a slave made by the husband and wife. *By the Court:* As head and master of the community, the husband has clearly the right, during its existence, to alienate the property belonging to it, and even to dispose of it by gratuitous title, if not made in fraud, or to the prejudice of the wife.

Arts. 174, 177 of the Code authorize a slave to make a contract for his emancipation.

APPEAL from the District Court, Parish of Calcasieu, *Overton, J. Morogh & Mouton*, for plaintiffs and appellants. *Kirby*, for defendants.

VOORHIES, J. The object of this suit is to set aside and annul an act of emancipation of the slave *Thornton*, one of the defendants.

That act was executed by *Michel Trahan* jointly with his wife *Reine Trahan*, the consideration stated being the long and faithful services of the slave. The slave emancipated belonged to the community, and was then over thirty years of age. *Reine Trahan* died without issue, leaving the plaintiffs, her collateral relations, as her legal heirs. *Michel Trahan*, surviving spouse, is entitled to the usufruct of the community, and being made a party defendant to this suit, insists on the right of *Thornton* to his freedom.

The grounds upon which the plaintiffs rely to set aside the act of emancipation, are, for informalities which, it is alleged, preceded its execution, except as to the authority of the wife, which, it is urged, was not legally given to her by her husband. The wife did join in the act with the authority of her husband.

From the view which we have taken of this case, we consider it unnecessary to express any opinion on the other grounds.

As head and master of the community, *Michel Trahan* had clearly the right during its existence, to alienate the property belonging to it, and even to dispose of it by gratuitous title, if not made in fraud, or to the prejudice of his wife.

Under the provisions of our Code, (Articles 174, 177,) a slave has the right to make a contract for his emancipation, 5 M. R. 494; 8 An. 558.

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In this case, conceding the right of *Thornton* to avail himself of the stipulation of freedom in his favor, of which we think there can be very little doubt, it is clear to our minds the plaintiffs cannot maintain this action. With respect to the status of this person, as concerns the public, or third persons, it is unnecessary for us now to express an opinion.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

JOHN BERSHEIM v. WILLIAM F. HUDSON.

Where there is nothing in the record to show that the matter in dispute exceeds three hundred dollars, the appeal will be dismissed.

APPEAL from the District Court, parish of St. Mary, *Voorkies, J. R. N. McMellan*, for plaintiff. *Lea*, for defendant and appellant.

BUCHANAN, J. The petition sets forth that plaintiff is owner of a lot of ground in the town of Franklin, parish of St. Mary, measuring about forty feet front on Main street, with a depth of one hundred and thirty-three feet: that defendant is erecting on said lot a fence, and, as plaintiff is informed and believes, will proceed to erect other buildings, unless restrained by legal process. Whereupon he prays an injunction against defendant, commanding him not to trespass on the land of petitioner, nor to erect fences or buildings thereon: that after hearing, the injunction be made perpetual, and that defendant be decreed to pay costs.

The answer of defendant denies specially that he has committed any trespass on plaintiff's land; alleges title in himself to a lot contiguous to the lot of plaintiff; avers that plaintiff has encroached upon him (defendant) by erecting a building which extends over his proper boundary; and concludes by a prayer that plaintiff be ordered to remove his said fences and buildings, and to pay defendant one hundred and fifty dollars damages for lawyers fees, &c.

The first question to be determined is, whether this be a case within the jurisdiction of this Court. The title of plaintiff, given in evidence, shows that he paid one thousand and sixty dollars for the lot described in his petition, with all the buildings and improvements thereon. The dispute between himself and his neighbor, the defendant, who derives title from the same source as the plaintiff, seems to be confined to a space of four inches in width by the whole length of the lot, and to the additional space, equal to the foundation of a chimney outside of the lot. Nothing in the record enables us to determine that the matter in dispute exceeds three hundred dollars, in the words of article 62 of the Constitution. It cannot be said that the value of the whole lot of plaintiff is to be the criterion, for the ownership of that lot is not in dispute. Indeed, the defendant neither has disputed, nor could he dispute the title of plaintiff; for his own title refers to that of plaintiff and is derived from the same source.

It should appear clearly from the record that the matter in dispute exceeds three hundred dollars. See *Hennen's Digest*, Appeal 1, No. —, and cases there cited.

It is, therefore, adjudged and decreed, that this appeal be dismissed, with costs.

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THOMAS MASKELL v. WM. F. HAIFLEIGH, Sheriff, et als.

Art. 620, C. P., which requires the decree of the Supreme Court to be recorded on motion *in open Court*, is repealed by the Act of 1852, entitled "an Act relative to the power of Clerks of District Courts, the parishes of Orleans and Jefferson excepted;" which confers upon the Clerks of District Courts, power "to receive, file and record all mandates and decrees rendered by the Supreme Court in causes taken up by appeal from their respective Courts, and to issue all legal process under such mandates and decrees of the Supreme Court."

The position is inadmissible that the formula "*ne varietur*" on a note, makes the equities between the original parties binding on the endorsees.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Maskell*, for plaintiff and appellant. *T. H. Lewis & Olivier*, for defendants.

BUCHANAN, J. In April, 1852, *Mrs. Elizabeth Moncure*, wife of *Paul Pecquet*, assisted by her husband, sued out a writ of seizure and sale upon an act importing a confession of judgment, against *Thomas Maskell*. *Maskell* appealed from this order of seizure and sale to this Court, and there was judgment affirming that of the Court below, at the September term, 1852. The mandate of the Supreme Court was filed in the Clerk's office of the District Court, on the 26th October, 1852, and on the same day an alias writ of seizure and sale was issued from the said Court. The present suit was then commenced by *Maskell* for the purpose of enjoining the execution, and an injunction was accordingly granted.

After hearing, the District Court rendered judgment dissolving the injunction, and condemning the plaintiff and his two securities on the injunction bond, jointly and severally, to pay fifteen per cent. on the amount of the judgment enjoined, as damages. From this judgment the plaintiff has appealed.

The grounds assumed in the petition in support of the injunction, are as follows:

1. That the mandate of the Supreme Court has not in open Court been ordered to be filed and carried into effect, as required by law, and all the proceedings have not been duly recorded.
2. That no legal donation has ever been made of the note sued upon, to the party who sued out the executory process.
3. That the note is marked "*ne varietur*," and consequently all equities between the original parties are subject to be offered against the endorsee.
4. That a suit is now (October, 1852,) pending in the same Court, in which the same matters are in contestation, undecided.
5. That the original creditor, payee of the note, promised that the payment of the same should not be enforced during his natural life.

The first of these grounds is based on Article 620 of the Code of Practice, which required the decree of the Supreme Court to be recorded, upon motion to that effect made in *open Court*, before execution could be issued thereupon.

This article has been repealed by the Act of 1852, No. 305; of which the 4th section (Session Acts, page 207,) confers upon the Clerks of District Courts

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the power "to receive, file and record all mandates and decrees rendered by the Supreme Court in causes taken up by appeal from their respective Courts, and to issue all legal process under such mandates and decrees of the Supreme Court."

The second ground was considered and overruled by our predecessors, upon the previous appeal; as appears from the opinion in evidence.

The third ground seems to be connected with the fifth. And even supposing that the formula "*ne varietur*" is to be considered as having the meaning and effect which the plaintiff desires to attach to it—a doctrine entirely inadmissible—yet there does not appear to have been even an attempt to prove such a promise, as is alleged in the fifth ground.

Upon the fourth ground for injunction, it is sufficient to observe that the suit alluded to is given in evidence, and that we cannot perceive any connection between the matters involved in that suit, and the present one.

We conclude with the Judge of the District Court, that this injunction rests upon no legal foundation, and that this is a proper case for the infliction of heavy damages under the Act of 1831.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SUCCESSION OF WILLIAM S. BARR.

Parties cannot be controlled as to the order in which they choose to introduce their evidence.

It is true, as a general principle, that the authority of an attorney at law cannot be disputed, except under certain circumstances; but the principle only extends to cases in which he is acting within the limits of the duties which his profession imposes on him. When disputed, the authority of an attorney at law, not of record, requires proof, as in cases of agency.

A PPEAL from the District Court, Parish of St. Mary, *Nicholls, J. Olivier*, for plaintiff. *Walker*, for defendant and appellant.

VOORHIES, J. In this case, *James Y. Smith*, classed as one of the creditors on the tableau of distribution filed in the Succession of *William S. Barr*, deceased, in May, 1834, took a rule on *Robert B. Brashier*, the curator, to enforce the payment of his claim.

The curator answered by pleading, as matter of defence, prescription and payment.

There was judgment in favor of plaintiff, making the rule absolute, and the defendant appealed.

Our attention has been drawn to a bill of exceptions in the record. On the trial of the rule, the Judge *à quo* ruled out a receipt offered in evidence, which was given to the defendant by *Franklin Wharton*, holding himself out as the attorney of plaintiff, for the sum of five hundred dollars. In connection, the defendant offered a letter written to him by *Wharton*, for the purpose of fixing the date of the receipt. The rejection of the evidence was based on the ground of the absence of proof showing the authority of *Wharton* to act as the attorney of plaintiff. It is conceded he was not the attorney of record for the plaintiff. Under the rules of practice, as settled by our jurisprudence, it is clear that parties cannot be controlled as to the order in which they choose to intro-

duce their evidence. Hence the defendant had clearly the right to introduce in the first place, the receipt; and if afterwards he failed to connect it with proof of the authority of the attorney, as a matter of course, it would produce no effect. It is true, as a general principle, the authority of an attorney at law cannot be disputed, except under certain circumstances; but, as we understand it, the principle only extends to cases in which he is acting within the limits of the duties which his profession imposes on him. When disputed, the authority of an attorney at law, not of record, requires proof as in other cases of agency.

Although the creditor appears to have waited a long time for the payment of his claim, yet, as the defendant may have it in his power to show the authority of the attorney and to substantiate his right to the credit which he claims, the ends of justice, we think, require that the case should be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and the case remanded to be tried according to law. It is further ordered that the costs of appeal be borne by the appellee.

SLIDELL, C. J. As my brethren think the ends of justice will be promoted by remanding this cause, and the circumstances of the case, (the long lapse of time and long silence of the creditor, &c.,) are such as to create doubts in my mind as to the extent of the defendant's liability, I concur in the decree remanding the cause; but wish to be considered as not expressing an opinion upon the bill of exceptions.

BANK OF LOUISIANA v. GERASIME RICHARD.

Plea of prescription having been filed in the Supreme Court, the case was remanded to enable plaintiff, if possible, to show an interruption.

A PPEAL from the District Court, Parish of St. Landry, *Overton, J. J. E. King*, for plaintiff. *Garland & Lastrappes*, for defendant and appellant.

VOORHIES, J. The defendant, sued as endorser of a promissory note drawn by *Dumartrait, Bordelon & Co.*, is appellant from a judgment rendered thereon against him. He relies on prescription as a bar to the action. The note sued on is dated the 27th of June, 1846, payable twelve months after date, and protested at maturity for non-payment, of which the defendant was notified.

The prescription is clearly acquired, unless interrupted by one of the causes prescribed by law.

As the plea has originated in this Court, the ends of justice require that the case should be remanded to enable the plaintiff to show such interruption.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be reversed, and the case remanded for further proceedings. The costs of appeal to be borne by the plaintiff.

LEONORA, alias NORA, f. w. c., v. EDWARD P. SCOTT and WM. E.
WALKER, Testamentary Executors, &c.

Petition dismissed, as in case of nonsuit, for want of proper parties to the action.

APPEAL from the District Court, Parish of St. Martin, *Voorhies, J. E. Simon*, for plaintiff. *J. E. Nicholls*, for defendants and appellants.

SLIDELL, C. J. The condition of the record in this cause is such that we do not consider it proper to pass upon the important questions which have been argued before us.

The case involves the validity of the gift of freedom by the testator, *Douglas Wilkins*, to a female slave with whom he lived in concubinage, and of donations to his illegitimate children, born to him by the concubine. It appears by the proceedings offered in evidence by the plaintiff, that of the two executors, *Walker* and *Scott*, named in the will, one of them, *Walker*, qualified. Two years before this suit was instituted, *Walker* had rendered an account of his executorship, and had given up the estate to the residuary legatees named in the will, to wit: the testator's sister, who was made usufructuary during her natural life, and her minor children, represented by their tutor. This action is brought against the testamentary executors, solely in their capacity as such; the usufructuary and the minor children, residuary legatees, are not made parties. Their interest in the questions presented is obvious, and the executors (one of whom never qualified, the other is *functus officio*,) were incapable of representing them. Indeed, the District Judge seemed to consider the executor as no longer charged with the estate, but that his functions had expired; and the decree is against "the heirs and universal legatees of *Douglas Wilkins*, deceased," who are not parties to the cause.

It is, therefore, decreed, that the judgment of the District Court be reversed, and that the petition be dismissed as in case of nonsuit, the costs in both Courts to be borne by the plaintiff.

THOMAS WILCOXON v. THOMAS MASKELL.

In an hypothecary action against a third possessor, Articles 69 and 70 of the Code of Practice, and Article 8865 of the Civil Code, require no other formality than the plaintiff's affidavit that he had demanded payment of his debtor thirty days before presenting his petition for an order of seizure and sale.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. J. H. Lewis* and *Olivier*, for plaintiff. *Maskell*, for defendant and appellant.

ROST, J. This is an appeal from an order of seizure and sale sued out against the defendant, who is a third possessor.

There is no evidence of any kind to show a demand from the original debtor thirty days previous to the institution of the proceedings.

The defendant, in the sale to him, has assumed the payment of the note, but the assumption is made on conditions which have not been fulfilled; and no

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demand was made of him before the seizure. Under the ruling of the case of *Valetti v. Gurlie*, 15th Louisiana, 189, the appellant is entitled to relief.

It is ordered, that the order of seizure and sale appealed from be set aside, and that the plaintiff pay the costs of this appeal and all costs in the District Court since the filing of the petition.

Olivier, for plaintiff, applied for a re-hearing :

In the above entitled case, the plaintiff and appellee moves this honorable Court for a rehearing, and begs leave most respectfully to assign the reasons which induce him to make the motion.

The Code of Practice, article 70, provides that: "the creditor who brings this (the hypothecary) action, must declare on oath, in his petition, that the debt, for which he demands the seizure of the hypothecated property, is really due to him, and that he has in vain demanded payment from his debtor, thirty days previous to his bringing his suit." In the case of *Smith's heirs v. Blunt*, 2 L. 135, and in *Gravier v. Bacon*, 4 L. 240, the Supreme Court held, that it is only in the *executory*, and not in the ordinary proceeding, that the affidavit, mentioned in the article above quoted, is necessary or required. If this doctrine is correct, and I do not see how it can be controverted, it follows necessarily that the oath taken by the plaintiff is to be taken as affording full proof of what is therein sworn to. If the affidavit is required only when the creditor proceeds in the *via executiva*, it appears to me most clear, that the intention of the law maker was to enable the creditor, under the responsibility of his oath, to proceed by seizure and sale against the mortgaged property in the hands of the then possessor, without subjecting him to the necessity of procuring additional evidence to establish the amicable demand on the original debtor. If it were otherwise, I confess, in all humility, that I cannot understand why it should be required. If it proves nothing, require it not.

It is not my province to inquire whether the law which enables a party to make evidence for himself, by means of his oath, is reasonable or unwise. I take the law, such as I find it written, and respectfully ask that it be applied to the case.

In the case cited by the Court, 15 L. 189, which was an injunction suit, the defendant, *Gurlie*, had proceeded against the plaintiff in injunction, not as a third possessor, but had treated him as his immediate debtor, and no affidavit, alleging the amicable demand on the original debtor, for aught that appears, was annexed to the petition. Such is not the case here; *Maskell* was proceeded against as third possessor. See plaintiff's petition and affidavit annexed.

The plaintiff and appellee, therefore, most respectfully prays that this honorable Court may reconsider the opinion delivered on yesterday, and that final judgment may be rendered in favor of the plaintiff.

A rehearing having been granted, the judgment of the Court was pronounced by

ODGEN, J. In this case a rehearing was granted by the former Supreme Court, and the case is now presented for our decision. The only point involved in the case is whether the plaintiff's affidavit that he had demanded payment of a mortgage debt thirty days before presenting his petition, is sufficient to authorize an order of seizure and sale in an hypothecary action against a third possessor. Articles 69 and 70 of the Code of Practice and 8365 of the Civil Code seem to us to require no other formality than this, and the plaintiff fully complied with it. The question is presented by an appeal from the order of seizure and sale, and assignment of the want of proof in the record of the demand, as error. No other proof than by the plaintiff's affidavit is required by law. Other matters of defence are set up which could not be brought before this Court on an appeal from this order of seizure and sale. We can only notice error in the judgment, apparent on the face of the record, and no other has been assigned but the one above mentioned.

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nies the indebtedness of her husband to her, and charges the judgment to have been obtained by fraud and collusion, and denies that it can have any effect against him as the purchaser of the property, or against *Felicité Neda*, the suing creditor, under whose execution he purchased, and prays that *Felicité Neda* may be made a party to the suit, and cited to protect the title transferred to him by the Sheriff. *Felicité Neda*, without any objection being raised by the plaintiff to her being made a party, appears and joins issue with both parties—she denies that she is bound to warrant the defendant's title, and denies that the plaintiff's claim against her husband is greater than the amount which she says was definitively established in the former suit between them, and pleads that judgment as *res judicata* against the plaintiff.

The defendant sets up also another defence to the action which we think cannot be maintained. He contends that, inasmuch as the price of the property remains unpaid, a creditor seeking to enforce a tacit mortgage has no right to disturb the sale which has been regularly made under the execution of another, but must look to the proceeds in the hands of the suing creditor, which, he says, being in the shape of a twelve months' bond, not yet satisfied, is within the reach of the plaintiff. We do not understand that to be the law—the creditor with a tacit mortgage may, if he chooses, look to the proceeds of the sale in such a case and enjoin the Sheriff from paying them over, but it by no means follows that his rights cannot be exercised by pursuing the property itself. That defence was, therefore, properly overruled. It then remains to be decided, what effect in the present controversy is to be given to the judgment in the suit of *Felicité Neda* against *P. Lebesque* and his wife. If that judgment is to be considered as *res judicata* in this suit, it fixes the amount of the plaintiff's claim against her husband at the sum of \$3497 89, of which she has been paid \$3025, leaving a balance due to her of only \$472 89, instead of \$1449, for which she obtained judgment against her husband. The plaintiff contends that the judgment in the suit of *Felicité Neda* against *Lebesque* and wife, annulling the first transfer, cannot be considered as a judgment fixing the amount due to the wife. We cannot so consider it. The object of the plaintiff in that suit was to compel the present plaintiff to prove the real amount due to her by her husband, in order to render as much property of the husband, as might remain after satisfying the wife's claim, subject to the judgment she had obtained against him. Issue was joined between the parties directly on that point, and we are bound to consider that, as between *Felicité Neda* and *Nathalie Judice*, respecting the rights of the latter as a mortgage creditor of her husband, the judgment fixed the amount of the rights of the wife, and, not having been appealed from, was final and conclusive. But it is next contended that the defendant, *Kerr*, not having been a party to that suit, cannot avail himself of the benefit of the plea of *res judicata* based on that judgment. The principle is well settled that a judgment rendered by a competent tribunal is final and conclusive, not only between the parties themselves, but also as to their successors or *ayans cause*. See Pothier on Obligations, Nos. 901, 904; *Delabigarre v. Municipality*, 8d Ann. R. 230. In what relation then does the present defendant stand to *Felicité Neda*, who was the party plaintiff in the suit in which the judgment was rendered establishing the amount of plaintiff's rights against her husband? He derives his title from a sale made under an execution issued on her judgment against *Lebesque*. He has not paid the purchase money, and if he is evicted from the property, he will not be

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bound to pay. Art. 711 of the Code of Practice declares, that when a suit has been commenced against the purchaser, in virtue of a general mortgage, to make him quit the property, he may retain the price, unless the suing creditor shall relieve him from the disturbance, or give him security against it. Such a privity then exists between the purchaser and the suing creditor, that he may, in our opinion, either call on the suing creditor to appear in the suit and defend him, or directly avail himself of any legal or equitable defence by which the suing creditor might himself oppose the hypothecary action—and this right is the more important to him because, by Article 718, if he has paid the money he only has recourse to the party in execution and not to the suing creditor. The suing creditor did become a party to this suit, and has set up the plea of *res judicata*, and even if any objection could have been made to his being cited as a party to the suit, it appears none was made in the Court below. The defendant, as well through the aid of the suing creditor whom he has called to protect his title, as by his succession to all the rights of the suing creditor by virtue of the Sheriff's adjudication, has a right to invoke the benefit of the final judgment, by which the rights of the plaintiff in the suit against her husband were established. We are also of opinion that the plaintiff is estopped from asserting a larger claim against her husband, so as to operate a prejudice to his creditors, by the public act signed by herself and her husband a little more than a month after the judgment was rendered fixing the amount due to her, in which they declare that her paraphernal and dotal rights amount to that exact sum, as fixed by the judgment. Third persons had a right, on the faith of that declaration in connection with the judgment rendered, to consider themselves secure, in purchasing property of the husband, from all claim on the part of the wife, except for the balance which, by that act, appeared to be due to her. For that balance, which is \$172 39, the property in the hands of the defendant is still liable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court below be avoided and reversed, and proceeding to give such a judgment as, in our opinion, ought to have been rendered—it is ordered, adjudged and decreed, that the property described in the plaintiff's petition and in possession of the defendant, be seized and sold to satisfy the sum of four hundred and seventy-two dollars, thirty-nine cents, the balance due to the plaintiff by her husband, *P. Lebesque*, with interest at the rate of five per cent. per annum from the 25th of June, 1851, and that the costs of this appeal be paid by the plaintiff and appellant, and the costs of the Court below by the defendant.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
OPELOUSAS,
IN
SEPTEMBER 1852.

PRESENT.

HON. PIERRE ADOLPHE ROST,
HON. THOMAS SLIDELL,
HON. WILLIAM DUNBAR.

EUSTIS, C. J., was absent during this term.

The following cases were not received until Seventh Annual was published—to which volume they properly belong.

WILLIAM M. NEYLAND *v.* WILLIAMS NEYLAND.

Cause remanded because continuance should have been granted.

APPEAL from the District Court, Parish of Calcasieu, *Overton, J. Kirby, Swayzé & Moore*, for plaintiff and appellant. *J. H. Jarvis*, for defendant.

SLIDELL, J. This action is upon a promissory note which matured in March, 1845, made by the defendant in favor of *M. Neyland* and by him indorsed to the plaintiff. It has endorsed upon it a receipt by the payee of a partial payment in March, 1846. The suit was brought by attachment on the 5th January, 1852. The citation which issued summoned the defendant to appear on the third Monday of March, from which we infer that that was the opening day of the next regular term. The writs of attachment and citation were returned on the 16th March, and on the same day the defendant made a personal appearance, and pleaded, among other matters, want of consideration and prescription. On the 17th the cause appears to have been called for trial. Whether it was set on the previous day for trial does not appear. Thereupon the plaintiff's attorney moved for a continuance upon the ground of absence of witnesses, and inability to obtain their testimony seasonably, they being in Texas. The application was accompanied by an affidavit made by the attorney, in the absence of his client, whose presence he swore he had expected. The affidavit sets forth the testimony which it was expected to obtain; and its showing, connected with what appears of record touching the course and condition of the suit, is such as to create in our minds the belief that there had not been a want of diligence on the part of the plaintiff. It is not easy to perceive how the plaintiff could, before the cause was called for trial, have obtained

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in competent form the testimony of witnesses residing out of the State, to meet the special matters of defence which were pleaded on the 16th. The Court refused a continuance, to which refusal a bill of exception was taken, and the cause being immediately pressed to trial, the plaintiff established the execution of the note, the endorsement of the payee, and that the endorsement of partial payment was in the handwriting of the defendant and signed by the payee. But the plaintiff having no evidence to rebut the plea of prescription, judgment was, on the 17th, rendered in favor of the defendant upon that ground. On the next day the plaintiff's attorney applied for a new trial, and supported his application by the affidavit of a person who says he arrived at the house of the attorney on the previous night, after the trial had taken place, bringing intelligence from the plaintiff, who was in Texas, to his attorney, that he was prevented by sickness from coming. The new trial was refused, and the plaintiff has appealed.

It is with reluctance we disturb the ruling of a District Judge on a question of continuance; but after carefully considering the affidavit made, and the attendant circumstances, as exhibited by the record, we are all of opinion that the continuance should have been granted. We find no laches on the part of the plaintiff, and, as we have said, it is not easy to perceive how the plaintiff could, under the circumstances shown in the affidavit, have been expected to be prepared on the 17th with testimony to rebut the plea of prescription filed on the preceding day.

We think that the justice of this case will be more satisfactorily ascertained by remanding it for a new trial.

Judgment reversed and cause remanded for a new trial, defendant to pay the costs of the appeal.

BLOSSMAN HAYES v. ISAAC HAYES.

It is against public policy to permit a person to stipulate for a partial immunity for the commission of a future immoral act.

APPEAL from the District Court, Parish of St. Landry, *Overton, J. Lewis & Porter*, for plaintiff. *Dupré, King & Linton*, for defendant and appellant.

SLIDELL, J. The exception pleaded by the defendant and which was overruled by the Court below, involves the proposition that a man may lawfully agree with another to limit his responsibility in damages for a future offence against such person's good name. Such a doctrine is as inadmissible as it is novel. It is manifestly inconsistent with public policy that a man should be permitted to stipulate a partial impunity for the commission of a future immoral act.

Such being our opinion, it is unnecessary to inquire whether the motion to dismiss the appeal, upon the ground that the judgment was not final, was well made.

Judgment affirmed, with costs.

ISAAC ALLOWAY v. MARGUERITE BABINEAU et al.

Action to annul a nuncupative will by public act. It was proved that one of the three witnesses to the will was not present when it was written by the notary. *Held*: The will was null and void. Under the Spanish laws marriage could be proved by reputation.

APPEAL from the District Court, Parish of Lafayette, *Overton, J. Girard*, for plaintiff. *C. H. & E. Mouton*, for defendants and appellants.

Girard, in support of evidence of marriage, cited *Succession of Prevost*, 4 A. 348; *Beaulieu v. Ternoir*, 5 A. 480; *Patton v. Philadelphia*, 1 A. 104.

DUNBAR, J. This suit is brought to annul the will of *Frederick Mathias*, and to have the plaintiff recognized as his only heir. It was proved to the satisfaction of the District Judge that one of the three witnesses to this nuncupative will by public act, was not present at the writing of the will by the notary, and that, whilst the latter was writing the will, this witness went about the town attending to his own business. This Court has decided that a nuncupative will to be valid must be *dictated* and *written* by the notary, as dictated, in the presence of three witnesses, residing in the place, &c., and then read to the testator by the notary in the presence of the witnesses, 12 La. 114, *Langley's Heirs v. Langley's Ex'rs*. The will not having been written in the presence of one of the three witnesses is, therefore, null and void.

The next question in this case is the heirship of the plaintiff. We agree with the District Judge, that his heirship has been established by legal evidence. It having been established by reputation that the marriage of plaintiff's father and mother took place while Louisiana was under the government of Spain, proof of marriage by reputation was sufficient under the laws of that country. *Succession of Prevost*, 4 Ann. 347.

As to the rights of *Marguerite Babineau*, wife of the deceased, as usufructuary, we will leave them where the District Judge left them, reserving all rights that she may have in that capacity.

The judgment of the District Court is, therefore affirmed, with costs.

MECHANICS' & TRADERS' BANK v. J. B. THEALL and ANN E. DOUGAN.

Decision in *Norwood v. Devall*, 7 Annual, 523, affirmed.

APPEAL from the District Court, Parish of Vermillion, *Voorhies, J. O'Brien*, for plaintiff. *Walker*, for defendants and appellants.

SLIDELL, J. The defendants being sued upon a promissory note, which matured nearly eight years before the date of this action, (February, 1852,) pleaded prescription. There was judgment for plaintiff, and the defendants have appealed.

The only question presented for our consideration is, whether prescription was interrupted by a former suit upon the same note, in which the defendants were cited in March, 1849, and in which suit there was the following decree :

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"In this case the plaintiff failing to appear and prosecute this suit, by reason thereof, it is ordered, adjudged and decreed, that the plaintiff be nonsuited." It is said by the defendants that, in such case, the plaintiff is to be considered as having abandoned the suit, within the intendment of Article 3485 of the Code, and that therefore, in legal contemplation, no interruption has taken place. This point was much discussed in argument, and received the careful consideration of the Court, in a recent case, (*Norwood v. Detall*, 7 Annual, 523.) We were of opinion that, in such case, the suit was not to be considered as abandoned, and we refer to the reasons then given.

Judgment affirmed, with costs.

ROSSELL BEEBE v. DAVID ROBBINS.

The vendee who suffers personal property to remain in the possession of the vendor, and thus enables him to acquire credit, or deceive a subsequent purchaser, cannot resist the claim of his vendor's creditors, nor that of a subsequent *bona fide* purchaser.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Lewis* and *Wilson & McClarty*, for plaintiff. *Gibbon*, for defendant and appellant. *Wilson & McClarty* :

Bringing slaves into the State to defeat the rights of property in other States, always discountenanced. *Frierson v. Irwin*, 5 A. 530. A purchaser can acquire no greater title than his vendor had. *Hopkins v. Van Winkle*, 2 A. 143; 4 A. 52; *McGregor v. Bull*, 4 A. 290; *Walker v. Municipality No. 1*, 5 A. 10. The doctrine laid down in *Jenkins v. Theriot*, 9 R. R. 84; and 11 *ibid*, 450; was reviewed by the Court in *Moore v. Lambeth*, 5 A. 66; in which last case the rule asserted was that "an honest purchaser of a defective title cannot hold against the true proprietor."

Rost, J. *James Debaume*, a resident of the State of Arkansas, conveyed certain slaves to trustees for the benefit of the creditors named in the indenture, with full power to sell the slaves at public or private sale.

The slaves, thus conveyed, were left by the trustees in the possession of *Debaume*. They were, shortly after, advertised to be sold at auction, but *Debaume* failed to produce them on the day appointed, and the sale was, in consequence, postponed for about two months. Before the day of sale, *Debaume* caused the slaves to be run off to Louisiana. They were offered for sale in Arkansas notwithstanding their absence, and adjudged to the plaintiff for \$194. *Debaume* soon after came to Louisiana, resumed possession of the slaves, and after executing various paper titles and fictitious powers of attorney, sold them to the defendant, who is a citizen of this State and a planter, for the sum of \$3000, which he received. That occurred in 1848.

The plaintiff now claims those slaves from the defendant, on the ground that the legal title vested in him, under the sale of the trustees, and he has adduced a very able opinion of the Supreme Court of the State of Arkansas which sustains his position adversely to the claim of *Debaume*. We do not doubt the correctness of that decision, but the present case turns upon other principles. There is nothing in the record to impeach the good faith of the defendant, and he must be viewed as an honest purchaser for a valuable consideration, which he has paid.

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v.
ROBBINS.

The facts of this case are identical with those in *Verdier v. Leprette*, 4th La. 42. The slaves, in that case had been conveyed to the plaintiff by *Campbell*, in Florida, by a deed of trust, and had been suffered to remain in the possession of *Campbell*, from whom *Leprette* had acquired them.

A witness testified in that case, as in this, that the indenture, under which the plaintiff claimed, was a deed of mortgage only, and not one of sale; but *Judge Martin*, who was the organ of the Court, said:

"Whether the indenture be considered as a deed of mortgage, or a deed of sale, as the plaintiff contends, it appears to us that the first Judge was equally correct in rejecting his claim: on the first hypothesis, as the hypothecary action was not instituted; and if it had been, on account of the absence of a record of a mortgage in this State.

"On the second hypothesis, the vendee who suffers personal property purchased to remain in the possession of the vendor, and thus enables him to acquire credit, or deceive a subsequent purchaser, cannot resist the claim of his vendor's creditors, nor that of a subsequent bona fide purchaser."

This authority is conclusive against the pretensions of the plaintiff.

It is ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both Courts.

STATE OF LOUISIANA v. WASHINGTON M. T. SMITH.

A recognizance should be endorsed as filed in Court, and should state the cause of its caption, and if it does not, it cannot be explained by reference to the indictment, found after it was entered into.

APPEAL from the District Court, parish of Vermillion, *Voorhies, J. Simon, jr.*, District Attorney, for the State and appellant. *O'Bryan*, for *McDonald*.

Rost, J. The State has appealed from a judgment rendered in favor of the surety on the recognizance of the defendant taken by the committing magistrate, and forfeited by his failure to appear at Court. The recognizance is without endorsement or filing in Court, or return from the magistrate; it does not set forth the cause for which it was taken, and as it was executed before the indictment was found, it cannot be explained by reference to it. The case does not differ from that of the *State v. Wooten*, 4th Ann. 515. It is time that magistrates should learn that the cause of taking recognizance should be stated in them.

The judgment is affirmed, with costs.

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VILLENEUVE BORDELON et al. v. THOMAS H. & W. B. LEWIS.

Article 127 of the Constitution of 1845, does not restrict the power of School Directors in the imposition of taxes under the Act of 8d May, 1847.

A PPEAL from the District Court, Parish of St. Landry, *Overton, J. Linton & Martel*, for plaintiffs. *T. H. & W. B. Lewis*, for defendants and appellants.

DUNBAR, J. This case comes up for the second time before us, having been remanded at a former term of this Court for a new trial. The plaintiffs, Directors of School District, No. 1, parish of St. Landry, sue the defendants for \$124, being the amount of their special school tax for said District, assessed upon the *ad valorem* value of their property subject to taxation, under the provisions of the Act of the Legislature of Louisiana, approved the 8d May, 1847, entitled an Act "to establish free public schools in the State of Louisiana." A judgment was rendered in the Court below for the plaintiffs, and the defendants have appealed. In their answer the defendants set up by way of defence, that the tax was more than double any amount that might be necessary, was exorbitant and unreasonable and in violation of the constitution of this State. Fortunately for us these very important questions are not now presented for the first time to our consideration. The counsel for the defence, in their oral argument, relied much upon the point that this tax was unconstitutional, it being in violation of Art. 127 of the Constitution of 1845, which is in these words: "Taxation shall be equal and uniform throughout the State." In the case of th *Second Municipality v. Duncan*, 2 Ann. 182, we decided that this Article of the Constitution applies to State and not to municipal taxes, and that the ordinance of the Council of the Second Municipality of New Orleans of the 29th August, 1846, imposing a special tax on all real estate within the limits of the Municipality for the purpose of paying its debts and providing for the support of the public schools, is legal and constitutional. *Chief Justice Eustis*, in delivering the opinion of the Court, quoted from the decision of the Supreme Court of Kentucky, in the case of the *City of Louisville v. McQuillan's heirs*, 9th Dana's Reports, remarks equally applicable to our constitution as to the constitution of Kentucky: "Among these political ends and principles, *equality*, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our State constitution, but an exact equalization of the burden of taxation is unattainable and utopian." And then went on to remark: "That the extreme difficulty of approaching an equality in the distribution of the burthens of taxation, is obvious to the most superficial observer—nor is its solution rendered easy by the progress of the science of political economy. The various, complicated and hidden sources of wealth, and the different opinions of economists as to the operation of any one tax or impost, show the obstacles which would attend any judicial inquiry as to the approximation to equality in a system of taxation. In the case before us, to use the language of *Chief Justice Marshall*: 'We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate one, and what degree may amount to the abuse of the power.' *McCulloch v. State of Maryland*, 4th Wheaton, 430." In the case of the *Provident Bank v. Billings & Pittman*, 4th Peters, 568, on the same subject,

Chief Justice Marshall says: "The power of legislation and consequently of taxation operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burthens; and that portion must be determined by the legislature. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract against unjust and excessive taxation; as well as against unwise legislation generally."

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This Court did, however, say in the case of the *Second Municipality v. Duncan*, just referred to, "That it might not be out of place to state that, as the guardians of the rights and property of citizens, we should fail in our duty if we were to forbear to exercise our power on any proper occasion to protect them from spoliation; at the same time it must be confined to its constitutional limits, and to those cases in which its authority cannot be questioned, and its action will consequently be effectual."

We do not consider the case under consideration is of this character, nor does it require, or admit of judicial interposition. We cannot perceive in the Act of the 3d of May, 1847, anything in violation of the constitution. If the legislature has the right, under that instrument, to delegate the power of taxation to the city of New Orleans, or one of its municipalities, to promote public education, as we have already determined, there is no good reason why the same power should not be delegated to School Directors in the various parishes of the State. Such a power has been delegated to Police Juries for the purpose of making roads, levees and bridges, and for other purposes, from the commencement of our State government to the present time. Their power to lay taxes for such purposes has not been questioned before the Courts or the people, and we think it is now too late in the day to question it. Indeed, we think that such powers are, not only constitutionally conferred upon the Police Juries and School Directors for parochial purposes, but that such powers could not, to advantage, be entrusted or exercised by the Legislature itself or Courts of Justice. It would be impossible for the Legislature to exercise such powers without being in constant session, and then they would have to do it without the local knowledge or information necessary—and as to the ordinary supervision, or administration of such parochial concerns, it is certainly not the province of the judiciary. There is nothing in the record to satisfy us that the tax in this case can amount to a spoliation, or an unlawful appropriation of private property, and we think the only remedy the defendants have is the ballot box, if the conduct of the School Directors does not meet their approbation.

We said in our former opinion in this case, that "if no tax was imposed by the former directors, and the people of the district have had the benefit of the schools, they are bound in conscience to pay those expenses for which a tax might have been imposed, and they have suffered no injury by the delay which has been given them. Laws should receive a reasonable interpretation." We see no good reasons for change in our opinion upon this question, and we still think that, upon a fair construction of the Act of 1847, that the plaintiffs had

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a right to levy a tax to discharge the indebtedness of their predecessors in office.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BARTHELEMY LEBEAU, for the use of, &c. v. JOHN GLAZE.

The rule is without exception that the mortgage falls with the principle obligation to which it is accessory.

APPEAL from the District Court, Parish of St. Landry, *Cushman, J.*, presiding. *Olivier*, for plaintiff and appellant. *T. H. Lewis, Lewis & Porter*, and *Swayzé & Moore*, for defendant and appellant.

Olivier, for plaintiff:

The general principle, that when the principal obligation is prescribed, the accessory falls with it, is one which will not be controverted when the property mortgaged remains in the possession of the original obligor. But it is respectfully submitted, that when the property goes into the hands of a third person, having notice of the incumbrance, and against whom the hypothecary action is brought within the time for prescription, the mortgage becomes, as it were, isolated from the principal obligation, and is more particularly in contact with the right of property of the third possessor. In other words, though the notes executed by P. H. Glaze may be prescribed, that prescription does not carry with it the extinction of the mortgage, but that prescription alone can avail which the third possessor could set up against an adverse claim to the property itself. I will not be charged, in urging this doctrine, which I believe to be the true one—the only one resting upon the immutable principles of eternal justice—with confounding the principles of modern jurisprudence with those which prevailed in the days of the law *Cum Notissimi*. This law, which fastened the effect of the mortgage upon the mortgagor, when the mortgaged property had remained in his possession, though the personal action against him was barred, was clearly irrational and in conflict with the maxim which we find in the Roman Law itself—that with the principal obligation perishes the accessory. In France it is provided (C. N., Art. 2180) that the debtor acquires the prescription of the mortgage, *as to the property which remains in his hands*, by the time fixed for the prescription of the action which gives the mortgage or the privilege. Thus, in that case, the mortgage—the accessory—follows the fate of the principal obligation. But not so, when the mortgaged property passes into the hands of a third party. Grenier, in his *Traité des Hypothèques*, Vol. II., No 510, tells us:—

L'hypothèque se prescrit par le même laps de temps que l'obligation principale, lorsque l'immeuble affecté est resté en la possession du débiteur; mais lorsque cet immeuble passe dans d'autres mains, l'hypothèque le suit; elle s'isole, pour ainsi dire, de l'obligation, et se trouve plus particulièrement en contact avec le droit de propriété du nouveau possesseur. Ce n'était donc plus dans ce cas, le temps réglé pour prescrire l'obligation, mais bien celui fixé pour prescrire la propriété, qui devait servir de base au législateur pour déterminer la prescription de l'hypothèque; aussi, l'art. 2180 porte, &c.

Troplong, in his *Droit Civil Explique*, verbo *Hypothèques*, Vol. IV., page 44, No. 878, says:—

Dans le cas où la prescription est opposée par un tiers détenteur de l'immeuble hypothéqué, on suivait, d'après le droit romain, les principes généraux en matière de prescription. Le tiers détenteur prescrivait par dix et vingt ans lorsqu'il avait titre et bonne foi, ou par trente ans lorsqu'il était de mauvaise foi. C'est aussi ce qui est décidé par notre article. Le tiers détenteur prescrit contre l'hypothèque par le même laps de temps qu'il peut prescrire la propriété.

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It results from this reasoning, that when the property mortgaged goes out of the hands of the mortgagor, the creditor has two actions; one, his personal action against his debtor, and the other, his hypothecary action, against the third possessor, and his rights against each become distinct and independent. He may interrupt prescription in one case, though he may have suffered it to run in the other. Is there any textual provision in our code which clashes with the doctrine contended for, and which prevails in France? It is true our code declares that the mortgage is accessory to a principal obligation, of which it is to secure the execution, and that when the principal debt is extinguished, the mortgage disappears with it. Such was the principle of the Roman law, and such is now the principle in France. True, the article of the French code restricts the principle to cases in which the property mortgaged has remained in the hands of the mortgagor, and our code does not so provide in express terms. Must we, then, because no distinction is expressly made, say that the Legislature intended that none should be made, or shall we adopt a more rational system, and go back for information to those countries which have had similar laws for centuries before they passed to us?

Does the language of the Code (Art. 3252) bear out the defendant in the position assumed by his counsel, that this action cannot stand, because, first, the notes being prescribed, the mortgage falls with it, and secondly, because the mortgage was not reinscribed within the time required by law. Article 3362 of the Code provides that "Creditors who have either a privilege or mortgage on immovable property or slaves, may pursue their claim on them in whatever hands they may happen to pass, to be paid out of their proceeds according to their rank, provided that their titles have been registered according to law."—Plaintiff's mortgage having been registered according to law, his right of action against the defendant was a real right which attached the moment the notes which he held matured, the slaves having gone into defendant's possession in 1841. (10 L. R. 496.) In 1845 the plaintiff brings his action to subject the slaves to the payment of the mortgage, and *Patrick H. Glaze* having, years before, removed to Texas, a bankrupt, no step is taken against him personally on the notes. In this view of the case, it is admitted that if the plaintiff had taken no action under the mortgage before the notes were prescribed, his hypothecary action could not stand; but having commenced his action in 1845, is the mortgage gone? Under Article 3362 of the Code, the plaintiff in 1845 commenced the pursuit of his claims on these slaves in the hands of the defendant. At that time, at least, it will be conceded, no prescription could be opposed to his action. After the amicable demand, and notice to him as their possessor, *John A. Glaze*, was bound, under Article 3363 of the Code, to pay the debt, or relinquish the property. He did not do it. The plaintiff, by his suit, then demands that the slaves mortgaged be seized and sold to pay his claim. This right he certainly had, and having exercised that right against *John A. Glaze* the third possessor of the mortgaged property, the only person against whom the right could be exercised, is it possible that the plaintiff should have now lost that right, because there was some delay in bringing that right to a final issue? Is not this confounding the right with the exercise of the right? And if you say that prescription has run, whilst the right, guaranteed by Article 3362, was asserted in the only legal manner that it could be—that is, by citation—what becomes of Article 3484 of the Code? Is the language there used mere inanity, having no meaning at all? Is it a mere lure which the Code holds out to the creditor, when it tells him in express terms, "A legal interruption takes place when the possessor has been cited to appear before a court of justice on account either of the property or of the possession?" But I may be told that this operates an interruption of the prescription by which property is acquired, but not of the prescription by which debts are discharged. I answer that the causes which interrupt prescription in the two cases are the same. (C. C., 3516.)

I know that it has been held again and again, that the extinction of the principal obligation by prescription, payment, novation, or otherwise, operates a release of the mortgage. But all the decisions I have read on the subject, are confined to cases where the hypothecary action had not been instituted before the extinction of the principal obligation by prescription. This is the first time, then, as I am aware, that the question comes up for solution. Our Code contains no express disposition on the subject. Neither public policy nor the demands of justice prescribe the recognition of a principle by which this action must be defeated.

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Is it true, however, that the notes held by plaintiff are prescribed? It will be conceded that they constitute the title or evidence by which the principal obligation was created; if so, are they not, with the mortgage which was designed to secure their payment, made the basis of this action? Was not then the defendant, the third possessor, at the inception of this action, bound to the plaintiff to the full value of the slaves held by him? If so, he was, *pro tanto*, a co-debtor of *P. H. Glaze*, and for that amount was as much bound to the plaintiff as *P. H. Glaze* himself. It follows, necessarily, that the citation served on *John A. Glaze* had the effect of interrupting prescription as to *P. H. Glaze*, the maker of the notes. At all events, the defendant cannot plead the prescription of the notes. Prescription is an exception which the creditor and his debtors alone can plead. The obligation subsists until they avail themselves of the prescription; Courts of justice cannot supply it. (2 An. 368.) As to the first two notes, the payment of which this mortgage was also intended to secure, it is clear that they have been extinguished by prescription, and the mortgage itself is extinguished *pro tanto*. (2 An. 927.)

The next objection is that the mortgage was not reinscribed. That the pendency of an hypothecary action to subject property to a judicial mortgage does not exempt the mortgage from the necessity of reinscription is no doubt true. In the case reported at p. 632, in 5 An., the plaintiff claimed to subject the property to her judicial mortgage; posterior to the first inscription of the judgment from which resulted the mortgage, rights had been acquired upon the property by another party, and as a judicial mortgage "exists and has vitality only by inscription, if there be no inscription there can be no judicial mortgage," and the third party, who in the meantime has acquired adverse rights, must be protected against the mortgage. Can the same be said of a conventional mortgage? Will the counsel for the defendant contend that a conventional mortgage has no effect, no vitality unless and until recorded? Surely not. (C. C. 3316 and 3319; 1 An. 219.) If during the pendency of this action ten years had elapsed from the time the right under the mortgage could have been exercised, without a renewal of the inscription, and in the meantime third persons, not claiming under the party sued, had acquired rights upon the mortgaged property, I concede at once that the mortgage could not operate to their prejudice, because the effect of the first inscription would have ceased. The mortgage itself, however, would have remained unimpaired by the omission to reinscribe, as between the defendant, claiming under the mortgagor, and the mortgagee. (C. C. 3314, 3315, 3316; 2 An. 776.) We show, however, that the inscription of the mortgage was renewed on the _____ day of _____, 185 _____. No action could have been brought by the plaintiff before the 19th of May, 1842. How is Art. 3338 of the Code to be construed? Does it mean, what it purports on its face, that the registry preserves the evidence of the mortgage during ten years, reckoning from the date of the mortgage? If such be the meaning of that article, it strikes at the very foundation of another principle, the propriety and justice of which had never been questioned, and which is, that prescription begins to run against a right only from the time that the right can be exercised. The mortgage under which the plaintiff claims is dated the 25th of October, 1838; the notes it secures, and which came into the possession of the plaintiff, fell due in May, 1842, and May, 1843. His right of action could only be exercised after the maturity of the first note, in 1842. Suppose, however, that the note was payable in 1840, the right under the mortgage might have been barred before it could be exercised! If this be law, I confess I do not understand the reason of the law.

T. H. Lewis, for defendant:

This case presents two questions:

1st. Whether the pendency of an action against the third possessor of mortgaged property will dispense the creditor from the necessity of reinscribing his mortgage? We say that his failure to reinscribe is fatal to his claims against the defendant. La. C. 3333. 2 An. R., 100, 520, 776 and 799.

2d. The plaintiffs, having suffered the notes, by which his debt is evidenced, to be prescribed, the mortgage granted to secure it is also extinguished, and cannot be enforced against a third possessor of the mortgaged property. La. C. 3505, 3030, 2157, n. 2.

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Rost, J. The plaintiff has appealed from a judgment rendered against him in an action of mortgage, instituted against a third possessor, upon a note prescribed upon its face.

The first ground of error assigned, is that the principle that the accessory falls with the principal obligation only applies so long as the property mortgaged remains in the possession of the original debtor, and that when it passes into the hands of a third person having notice of the encumbrance, and against whom the hypothecary action is brought, as it was in this case, before prescription accrued upon the principal obligation, the mortgage becomes isolated from, and does not fall with it.

This distinction is in direct conflict with Art. 3252 of the Code, which provides that, in all cases where the principal debt is extinguished, the mortgage disappears with it. It also conflicts with Arts. 3249, 3494 and 3495, as expounded by our predecessors, in the case of *Shields v. Brundige*, 4 La. 326. The passages cited from *Grenier* and *Troplong*, have reference to the dispositions of the Code of France, which regulate the prescription of mortgages; our Code contains no such dispositions, and the rule here is without exception, that the mortgage falls with the principal obligation to which it is accessory. See *Succ. Linderman*, 8d Ann. 714; *Succ. of Dubreuil*, 12 Rob. 1207; *Auguste v. Bernard*, 8d Rob. 389.

The judgment is affirmed. with costs.

ROBERT CADE v. M. YOCUM & Z. JONES.

A plaintiff who neither arrests the defendant, nor disturbs her property, will not be mulcted in damages, because it turns out that he was mistaken as to what he supposed were his legal rights.

APPEAL from the District Court, parish of Vermillion, *Voorhies, J. Brent*, for plaintiff. *Walker, and Lewis & Porter*, for defendants and appellants.

Defendants' counsel cited to sustain claim for damages—C. C. 1928; *Guise v. Harvey*, 14 L. R. 202; *Copely v. Berry et al.*, 12 R. 80; 2 A. 620; 3 A. 588; *Penny v. Taylor*, 5 A. 713, C. C. 2294.

SLIDELL, J. The object of this suit is to recover from the defendant the amount of a debt paid by plaintiffs as surety of *Rutherford*, the former husband of the defendant, upon the ground that she had not taken the necessary steps at the time of his death to exonerate herself from the payment of one-half of the community debt; and also upon the further ground that she had intermeddled in the estate. A judgment obtained by the wife against the husband was also attacked as fraudulent.

The defendant asserted the validity of her judgment, denied her liability on the grounds charged, and pleaded an agreement between herself and plaintiff, whereby he received from her in compromise certain cattle, and abandoned all further claim against her.

The cause was tried by a jury, who found a verdict for the defendant.

A charge was given to the jury by the District Judge, in which he noticed various points of law raised by the parties. But he also told them, that in his opinion, the main question in the cause was the agreement set up by the defendant; that if they should be of opinion, from the evidence, that the stock of

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cattle and horses was given to the plaintiff in consideration that he should discharge the defendants from any further liability resulting from his claim against her husband, their verdict should be for the defendants.

We have considered the conflicting testimony on the subject of the agreement, and giving due weight to the finding of the jury, we are not prepared to say that the defence on that ground was not made out. Witnesses may differ in their recollections of distant facts, and a clear conflict of evidence may occur, without necessarily involving a disposition on the part of any of the witnesses to pervert the truth. We may add that there are circumstances in the evidence, independent of their testimony, which indicate (although not, it is true, in such a manner as to estop him) the plaintiff's recognition of the validity of the wife's judgment, and the existence of amicable relations subsequent to the agreement, giving countenance to the proposition that the present claim had been adjusted and compromised. It is also to be observed that the evidence renders it at least probable that the wife had a just claim against her husband, and the plaintiff may, therefore, well have considered a compromise, by which he obtained something, preferable to litigating with the wife, whose mortgage would still survive, if her claim was proved, even although the judgment obtained by her against her husband should be set aside.

There was a claim in reconvention set up, which we think the jury properly disregarded. We see no ground to relieve her from the partial payment of the claim against her husband which she thought proper to make in order to buy her peace; and as to the damages claimed for the expense incurred by the defence of this suit in counsel fees, and the trouble and mental annoyance to which it has subjected her, such matter is clearly not a subject for damages. The case is one in which the plaintiff, without arresting the defendant's person, or disturbing her property by seizure, simply presents before a Court of justice a money demand; and he is not to be mulcted in damages because it turns out he was mistaken as to what he supposed were his legal rights.

Judgment affirmed, with costs.

MELAIDE BROUSSARD v. FRANÇOIS ROBIN, Adm'r.

GIRARD PREJEAN v. THE SAME.

On the filing of a final tableau by an Administrator making distribution among the heirs—the Administrator, having asked for citation for the heirs, cannot be forced to trial before they have been made parties.

APPPEAL from the District Court, parish of St. Landry, *Cushman, J.*, presiding. *Linton*, for plaintiff and appellant. *Swayzé & Moore*, for defendant.

SLIDELL, J. In these cases the true subject matter is a rendition of account to the heirs, and a distribution among them of the remaining assets of the succession. In such a proceeding, the necessity that all the heirs should be in some form before the Court, seems obvious. The Administrator, upon filing his tableau, asked a citation of all the heirs, but was forced to trial before this had been accomplished, and to this ruling of the court he took a bill of excep-

tions. We are of opinion that the exceptions were well taken, and it becomes indispensable, therefore, to remand the causes.

It is therefore decreed that the judgment of the District Court be reversed, and that the consolidated causes be remanded for a new trial, and for further proceedings, according to law—the heirs, appellees, paying the costs of the appeals.

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DUNLAP, MONCURE & Co. v. ALEXANDER BRETTE et. al.

Plaintiff charged an indebtedness on the part of defendant for advances, as would appear by vouchers, from No. 1 to 13, that would be produced on the trial. On the trial, a contract was offered in evidence, to the admission of which a bill of exceptions was taken. *Held*—the evidence was properly admitted. The defendant might have craved oyer of the vouchers, of which the contract was one—and having filed his answer without doing so, the presumption is, he knew what they were.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Maskell & McGill*, for plaintiff. *Brette & Fricker and Gibbon*, for defendants and appellants.

Rost, J. The plaintiffs allege that they advanced to the defendant, *Brette*, at sundry times, \$48,649, to be invested in the purchase of sugar for his own account, which sugar was to be consigned to them at Richmond, Virginia, to be sold, and the proceeds thereof applied to the reimbursement of the amount thus advanced, together with interest and commissions. They further allege that the defendant *Fay* became the surety of *Brette* for the reimbursement of those advances. They claim from both defendants the balance due them, arising from losses on the sugar bought by *Brette*.

Brette urges as his principal defence, that he acted as agent of the plaintiffs in the purchase of the sugar, and that he has rendered to them a full and correct account of his agency. He denies the indebtedness alleged, and has also filed a claim in reconviction, which the opinion we have formed renders it unnecessary to notice. The defendant *Fay* adopts the defence of *Brette*, and denies being indebted to the plaintiffs as a surety, or in any other manner.

There was judgment against both defendants for a portion of the sum claimed, and against *Brette* alone for another portion. The defendants have appealed, and the plaintiffs' counsel asks that the judgment be amended, by allowing them commissions as if they had sold the sugar, and that *Fay* be condemned to pay them the whole amount due them by *Brette*.

On the trial of the cause, the defendants' counsel objected to the admission in evidence of a written contract for the loan of \$6000 by *Henry W. Moncure*, in the name of the plaintiffs, to *Brette*, with the security of *Fay*, on the ground that said contract was not set forth and described in the petition, and was different from the contract therein set forth; but the Judge admitted the evidence, and the defendants' counsel took a bill of exceptions.

We are of opinion that the District Judge did not err. It is alleged in the petition that the plaintiffs advanced to *Brette* the sum of \$48,649, as per vouchers, from No. 1 to 12—which will be produced on the trial. The defendant might have craved oyer of those vouchers before filing his answer, and as he did not do so, the presumption is that he knew what they were. The contract objected to being one of them, could not have operated a surprise to him, under our liberal system of pleading. We think the evidence was properly admitted.

DUNLAP, MONCURE & Co.,
v.
BRETTE.

In justice to the defendants, as well as to the parties who made the loan, we must believe that this sum of \$6000 was, as the other advances made, to be employed in the purchase of sugar, or at least in making advances to planters who agreed to ship their crops to the house of the plaintiffs; otherwise the stipulation in the contract that the amount loaned should be refunded to the plaintiffs out of the proceeds of the sugar shipped to them by the planters, at the instigation of *Brette*, would have contemplated a fraud which no Court of justice could sanction.

We think with the District Judge, that the capacity with which *Brette* acted in these transactions, is free from difficulty, and that there is no pretence for saying that he was the agent of the plaintiffs. The letters, upon detached portions of which counsel rely in support of that position, prove the reverse; and the facts that his father-in-law became his surety for the advances made, and that *Brette* himself had a settlement with the plaintiffs, as their debtors, by which the amount of the original debt was reduced to the sum claimed, are conclusive against him.

On the merits, we are satisfied that there is no error in the judgment to the prejudice of the defendants.

Brette claims the proceeds of the shipment of the thirty-three hogsheads of sugar, purchased by him from *Amelin* and shipped to the plaintiffs. The sum credited to him in the settlement of November, 1847, at the date of the 12th of April, 1847, is the net proceeds of that shipment, upon which it appears a profit was made. The expression in that settlement that the sum of \$36,181 21 was the net proceeds of all the said sugar and molasses sold by *Brette*, except thirty-three hogsheads, means that out of all the sugar purchased by *Brette*, which was to have been consigned to them, they only sold thirty-three hogsheads, and that the remainder was sold by *Brette*.

It is in evidence that the plaintiffs advanced \$6000 to *Brette*, for the use of one *Crawford*, \$3,720 of which was for sugar purchased of *Crawford* by *Brette*; *Brette* refunded to them the balance of \$2,220, and now claims the proceeds of a shipment which *Crawford* made to the plaintiffs the year after, to pay that balance. This sum of \$2,220 is not charged to *Brette* in the settlement made between the parties; the plaintiffs only charged \$3,780, the cost of the sugar purchased and sold by *Brette*. The subsequent shipment made by *Crawford* was a matter between him and the plaintiffs, in which *Brette* has no interest.

On the 11th of March, 1847, the defendant *Fay* entered into the following agreement with the plaintiffs:

"In consideration of the facilities furnished to *Alexander Brette*, my son-in-law, by Messrs. *Dunlap, Moncure & Co.*, of Richmond, Virginia, to meet the said *Brette's* purchases of sugar this season, the advance being for the full cost of the sugar and molasses, which is to be consigned to said firm at Richmond, for account and interest of my said son-in-law, I hereby oblige myself to be responsible to *Dunlap, Moncure & Co.* for any deficiency which by possibility may arise in the net proceeds of the sales."

The District Judge was of opinion that this agreement only extended to the faithful accounting by *Brette* of the net proceeds of the sugar, and that *Fay* was not liable to the plaintiffs for the amount of advances unpaid. This is clearly an error; it could not be in the contemplation of the parties at the time the contract was made, that *Brette* should account for the proceeds of the sales of the sugar, because the sugar was to be shipped to the plaintiffs who

were to sell it, and themselves account for the proceeds to *Brette*. The plain intent of the obligation is that, as the plaintiffs advanced to *Brette* the entire price of the sugar bought, and left themselves no margin in case of loss, *Fay* would secure them against the unusual risk thus incurred by them; and make good their advances in case of loss by the shipments. The plaintiffs are entitled to have the judgment amended in that respect. We do not think that they have against the defendants any claim beyond those asserted by them in the settlement of November, 1847.

DUNLAP, MONCURE
& Co.
v.
BRETTE.

It is, therefore, ordered that the judgment be amended, and that the plaintiffs recover of the defendant *Fay*, as security of *Brette*, the sum of \$3,649 97, with legal interest from the 4th of January, 1850, until paid; and that the judgment as amended be affirmed, with costs.

AMENDED DECREE.

Rost, J. The Court having fallen into an error of fact in this case, and it appearing from the record, that on the 2d of February, 1848, the plaintiffs received of *Henderson Crawford*, on account of the defendant, *Brette*, the sum of \$2,220 capital and \$244 interest, they should have been made to account for those sums. These amounts imputed to the note of \$6000, which is the most onerous debt of the defendants, will over-pay it by \$51 08. This balance must be deducted from the amount due the plaintiffs on the open account.

The judgment heretofore rendered in this case is, therefore, changed so as to read as follows:

It is ordered that the plaintiffs have judgment against and recover from the defendants, *Alexander Brette* and *Theodore Fay*, in solido, the sum of \$3,589 97, with legal interest from the 4th of January, 1850, until paid, and costs in both Courts.

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WILLIAM F. A. FLEETWOOD v. HENRY C. DWIGHT.

Damages allowed for the wrongful issuance of a provisional seizure for rent, without malice.

APPPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Tucker & McGill*, for plaintiff. *Gibbon & McMillan*, for defendant and appellant.

DUNBAR, J. This suit was brought to recover damages for the wrongful suing out of a writ of provisional seizure for rent due by the plaintiff in this action, to one of the defendants. It appears that the plaintiff, being the tenant of *Henry C. Dwight* for the rent of a store in the town of Franklin, at the rate of \$25 per month, failed to pay his landlord any rent for the space of fifteen months. It is true that the plaintiff sets up as an excuse for such conduct, that notice had been given to him that some third person claimed the property rented—but this difficulty, if any, was at once obviated by the agent of the defendant offering to give him good security against any such claim. Under these circumstances, the plaintiff having a very small stock of goods on hand, the agent of *H. C. Dwight* sued out a writ of provisional seizure for \$375, the amount of the rent due. Before taking this step, the agent of *Dwight* had made frequent demands of *Fleetwood* for the rent, and had further agreed to wait with him upon his giving security to the end of the year. But *Fleet-*

FLERTWOOD
v.
DWIGHT.

wood failed to give the security, although the indulgence was extended to him by the agent. On the trial of the provisional seizure *Dwight* had judgment for his rent, with legal interest from judicial demand, but the seizure was set aside.

On the trial of the present suit for damages, the jury gave a verdict for \$688, for which amount the Court below gave judgment in favor of plaintiff.

Both parties complain of this verdict and judgment. The plaintiff complains that adequate damages have not been awarded to him for the injury done to his credit as a merchant, and contends that his small stock of goods was much injured whilst under seizure. We cannot see how a man, who had not paid any rent to his landlord for fifteen months, with a stock of goods not worth more than a few hundred dollars, could have had his credit very much injured by an order of seizure against him, and it must be remembered that he brought it upon himself by his own fault in not having paid one dollar to his landlord for fifteen months at the small rent of \$25 per month.

We consider that the evidence shows great indulgence and forbearance on the part of the landlord, and an entire absence of malice on his part, or his agent. We cannot see, from the evidence, that the plaintiff has much right to complain of the damage done to his goods whilst under seizure. It appears that they were not probably injured more than 10 per cent whilst under seizure, and it is further shown that when appraised at \$388 67 they actually sold for \$444 45 at the Sheriff's sale.

From a review of these facts we have come to the conclusion that excessive damages have been given by the verdict of the jury. We have heretofore held, "that damages for the wrongful issuance of a provisional seizure for rent will not be allowed where the seizing creditor acted without malice, and where the circumstances were such as to give probable cause for the seizure." *T. & G. Forbes v. Geddes*, 6th Ann. 402. Instead, however, of giving a judgment in this case for the defendants, we will lessen the damages.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and it is further ordered, that the plaintiff have judgment against the defendant *H. C. Dwight* for \$150, with costs in the Court below, and that appellee pay the costs of this appeal.

ROBERT McCARTY v. A. R. SPLANE et al.

The transferee of a litigious right from one who purchased it, but was incapacitated to buy, under Article 2422 of the Code—to the knowledge of the transferee—acquires nothing—and the debtor, when sued, may set up the nullity of the sale.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Walker*, for plaintiff and appellant. *Olivier*, for defendants.

Walker, for plaintiff:

On the trial of the case *nisi*, I contended as I do now, that the sale of *Splane's* judgment against *McCarty* could not be treated as a nullity until the nullity was ascertained and determined by a suit brought for that purpose; that by a long series of decisions, this Court had fixed the rule that no sales could be treated collaterally as nullities, except such as were clearly simulated,

and referred the District Judge to 4 L. R. 89; 11 R. R. 288; 5 L. R. 124; 4 L. R. 338; 3 L. R. 448; 8 L. R. 146; 9 R. R. 70; 14 L. R. 424; 3 Ann. R. 640; 2 Ann. R. 912. In the last of the foregoing cases, the Court say:— "Having failed to establish the continued possession of the vendor after this registered and recorded sale, it was indispensable to the success of the defence set up in this action by the defendants, to prove that averment of simulation by other evidence; for when there has been a real though fraudulent sale operating to the detriment of creditors, the title and possession of the purchaser cannot be disregarded. The creditor, in such cases, can only reach the property conveyed, by causing the sale to be annulled in a direct revocatory action. It is well settled that the title in such cases cannot be attacked directly commencing with a seizure." In the case at bar there was a public sale, which became a matter of record, and the defendant, *Splane*, was bound to know it, even if he had not been specially notified by the Sheriff of the seizure.

SLIDELL, J. *Splane* having a judgment against *McCarty*, took out a *fiore facias*; and then *McCarty* obtained an injunction in the present action, alleging that *Splane's* judgment against him had been sold under execution, and that he, *McCarty*, was now the owner of it. He prayed for the perpetuation of the injunction and \$200 damages for the annoyance. *Splane* pleaded in defence the nullity of the judicial sale under which *McCarty* claimed.

It appears then at the time of the judicial sale of *Splane's* claim against *McCarty*, it was a litigious right, the suit upon it being then pending on an appeal to this Court. The person to whom it was adjudicated for one dollar at the Sheriff's sale, and who subsequently transferred it to *McCarty*, was an attorney at law, practising in the Court where *Splane's* suit was brought, and in this Court. Under the Article 2422, he was incapable of purchasing; his transferee was aware of the incapacity; and the defendant had, in our opinion, a right to set up the nullity as a means of defence against the present suit.

Judgment affirmed, with costs.

MARTIN F. DEMARET v. JOSEPH T. HAWKINS.

In judicial sales the amount of mortgages assumed by the purchaser, and which turn out not to be due, enure to the benefit of the defendant in execution.

The right to rescind a sale for lesion beyond moiety, is the only restraint upon the liberty of the citizen to bind himself and his property according to the dictates of his own judgment: and the evidence relied on to establish lesion should be peculiarly strong and conclusive.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Lewis & Olivier*, for plaintiff. *Gibbon*, for defendant and appellant.

ROST, J. This is an action for the rescission of a sale of immovable property on the ground of lesion beyond moiety.

The defendant admits the purchase, but avers that the price stipulated, and the onerous conditions imposed upon him, were the full value of the property at the time he acquired it.

The case was tried before a jury, who limited their verdict to the finding of the following facts:

1st. That the real consideration of the sale was \$17,836 00.

McCARTY
v.
SPANE ET AL.

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119	826

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122	949
122	950

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DEMAREST
c.
HAWKINS.

2d. That the property was worth on the day it was sold \$37,923 80.

The defendant has appealed from the judgment rendered against him on this verdict.

It is stated in the act of sale, which is authentic, that the price agreed to be paid is \$20,576, and the fact found by the jury that it was \$17,836 is manifestly erroneous. The purchaser is bound, under all circumstances, to pay the price stipulated, and if the amounts, which he assumed to pay as part of it, were not due, or have since been paid by the vendor, the latter can recover them from him. 3d M. R. 248. It has been frequently held that in judicial sales the amount of such mortgages, assumed by the purchaser, as turned out not to be due, enure to the benefit of the defendant in execution. We consider the principle elementary.

This was clearly the view taken originally by the plaintiff's counsel, as is shown by the allegation in the petition, that the property was sold for \$20,576, which is alleged to be less than half of its value; and it is singular that the jury should have disregarded that admission, and the authentic evidence of its truth. Taking this sum to have been the real consideration, lesion beyond moiety was not proved to the satisfaction of the jury; and after a careful perusal of the evidence, we are satisfied that if there is error in their estimate, it is not because it is *too low*. Under the view we took in the case of *Beale v. Ritters*, 7th Ann., of the limits in which the estimates of the value of the property, at the time of the sale, should range in cases of lesion, that evidence is far from being satisfactory. Probable estimates are at best an inferior kind of evidence, admissible only when no better can be had, and they seldom carry conviction to the mind. In this case, for instance, thirty-two witnesses were examined, and made as many different estimates, ranging from \$22,637 00 to \$42,250 00. The estimate of the jury differs from all the others. Such a result has not the reasonable certainty upon which alone courts of justice can act in setting aside a contract entered into in good faith. See *Seaton v. Municipality No. 2*, 8d Ann. 44.

The right to rescind a sale for lesion beyond moiety, is the only restraint upon the liberty of the citizen to bind himself and his property according to the dictates of his own judgment, and the evidence relied on to establish that right, should be peculiarly strong and conclusive.

It is ordered that the judgment in this case be reversed—that there be judgment in favor of the defendant, with costs in both Courts.

NATHALIE JUDICE v. FELICITE NEDA.

The insolvency of the husband will not prevent a conveyance of property by him to his wife for the purpose of replacing her dotal and paraphernal effects, alienated during the marriage.

A PPEAL from the District Court, Parish of St. Martin, *Voorhies, J. Albert Voorhies*, for plaintiff. *Olivier*, for defendant and appellant.

Rost, J. The plaintiff opposes the seizure of immovable property, made at the suit of the defendant, on the ground that this property was conveyed to

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her by her husband, to replace her paraphernal effects alienated during marriage.

The defence is, that the husband was insolvent at the date of the sale, and that Art. 2421 of the Code does not extend to the case of a husband in failing circumstances.

This is clearly an error; the wife, before she obtains a separation of property is bound to allege and prove the embarrassment of her husband, and to justify her belief that his property may not be sufficient to meet her rights and claims; so that the husband must generally be in failing circumstances before a separation of property can be obtained—and yet article 2421, expressly authorizes transfers of property by the husband to the wife in satisfaction of those judgments. There is no distinction made between transfers made after a judgment of separation, and those which are made without such a judgment.

The case of *Montilli* was one of declared insolvency by the husband, and came as such under the provisions of the Act of 1817. The sale made to the wife in that case was set aside because she had not brought herself within the letter or spirit of the proviso of the 24th section of that Act, by showing the reality and good faith of the transaction. In this case there is no declared insolvency, and the claim of the wife is conclusively proved. 1 Ann. 42.

Creditors are not without remedy in cases where the husband has given an unjust advantage to his wife, under the pretext of replacing her dotal or paraphernal rights. See *Spurlock v. Maner*, 1st Ann. 301.

If it were alleged and made probable that the value of the property given in payment to the wife was underrated, and the husband was shown to be insolvent, we would feel authorized to grant relief—but there is nothing in the record upon which we can act.

The plea of *res judicata* is clearly untenable. The contract avoided in the first suit was not the one under which the defendant claims.

The judgment is affirmed, with costs.

PRESCILLA LACOMB v. HER HUSBAND.

APPEAL from the District Court, Parish of St. Landry, *Overton, J. Linton*, for plaintiff and appellant.

Rost, J. There is nothing in the record to show the embarrassments of the husband, which render a separation of property necessary.

A judgment of separation of property, obtained under those circumstances, is held in law to be collusive; and although we cannot reverse it without a prayer of the appellee to that effect, we do not feel bound to amend it as prayed for by the appellant. No amendment made by us would give it validity against the husband's creditors.

The appeal is dismissed with costs.

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W. B. McCUTCHEON & Co. v. JOHN DAVIS.

Decision in *Mages v. Dunbar*, 10 L. R., 550, affirmed.

APPEAL from the District Court, Parish of St. Landry, *Overton, J. J. E. King*, for plaintiffs. *Swayzé & Moore*, for defendant and appellant.

Plaintiffs' counsel cited *Burns v. Hayes*, 18 L. R. 12; *Mages v. Dunbar*, 10 L. R. 546.

Defendant's counsel cited 1 L. R. 118, 283; 3 M. 378; 2 N. S. 389.

SLIDELL, J. The suit is brought upon certain undorsed notes of the defendant, of which the firm of *W. B. McCutcheon & Co.*, is the payee. In the petition it is alleged that *John B. Howell, William B. McCutcheon* and *Stoddart Howell* compose the firm, and as such they sue. In his plea the defendant denies that those persons compose the firm. The notes being produced and offered at the trial, and the signature of the maker proved, the District Judge gave judgment for the plaintiffs, by which we understand a judgment in favor of the firm of *Wm. B. McCutcheon & Co.*, the payee, the suit throughout being entitled as the suit of that firm. The defendant has appealed, and now insists that proof should have been given that the above named individuals composed the firm. The opinion of the District Judge that such evidence was not essential to a recovery under the pleadings, seems to be sustained by the opinion of our predecessors in *Mages v. Dunbar*, 10 L. R. 550, and we do not feel disposed to disturb that precedent.

Judgment affirmed, with costs.

EUGENE WARTELLK, Agent, &c., v. JOHN P. HUDSON et al.

The maker of a promissory note, transferred by the holder to the vendor of property, cannot resist payment on the ground that the vendor had no authority to sell.

Suit on a note payable to the order of H. & R., but endorsed by H. alone. *By the Court*: The defective endorsement on the note was cured by the subsequent declaration of R., that H was authorized to use the note as he did: the date of that declaration is immaterial.

APPEAL from the District Court, Parish of St. Landry, *Cushman, J.*, presiding. *Garland & Lastrappes*, for plaintiff. *Linton*, for defendant and appellant.

ROST, J. The plaintiff, acting as agent of *Fremont* and wife, who reside out of the State, sold four slaves to *Fergus Hathorn*, one of the defendants, and received, in part payment, a note subscribed by the other defendant, *John P. Hudson*, payable to the order of *Hathorn* and *Reetes*, and endorsed by *Hathorn* in his own name. This note was protested at maturity, and the plaintiff now seeks to recover the amount of it from the drawer. The petition also prays for judgment against *Hathorn*, and that the slaves sold may be subjected to the mortgage retained upon them to secure the payment of the price.

Hathorn made no defence. *Hudson* pleaded the general issue, that the plaintiff had no authority to sell the immovable property of *Fremont* and wife,

and that *Hathorn* was likewise without authority to transfer a note belonging to the firm of *Hathorn & Reeves* for his private benefit.

WARTELLE
v.
HUDSON ET AL.

There was judgment against the defendants *in solido*, and *John P. Hudson* has appealed.

Had the defendant *Hathorn* set up the defence of the appellant, it would have been a serious question whether the power of attorney, under which *Wartelle* acted, authorized him to sell the slaves of his principles; but as he has not raised that objection, it is clear that his debtor had no capacity to raise it. He owes the amount of the note, and is bound to pay it to the assignee of his creditor, who is a party to the suit, and does not object to the payment.

The defective endorsement on the note was cured by the subsequent declaration of *Reeves*, that *Hathorn* was fully authorized to use the note as he did; the date of that declaration is immaterial.

There was no obligation *in solido* between the defendants, but as they are each bound for the whole amount of the judgment, the objections to its form are mere verbal criticisms and do not authorize the reversal of it.

The judgment is affirmed, with costs.

FRANCIS BILLEADEAU et als. v. THOMAS KELLER et als.

Under the Code of Practice and laws of this State, there is no other mode of compelling a party to a suit to give evidence than that by interrogatories on facts and articles.

APPEAL from the District Court, Parish of St. Landry, *Cushman, J.*, presiding. *Linton*, for plaintiffs and appellants. *Swayzé & Moore*, for defendants.

DUNBAR, J. This is a suit to recover damages on an injunction bond. The District Judge gave a judgment for plaintiff against the defendants *in solido* for one hundred and fifty dollars, with interest from the 19th April, 1848. The conflicting and contradictory testimony with regard to the damages suffered by plaintiffs, owing to the suing out of the injunction by the defendants, renders it doubtful whether damages ought to have been allowed. There was only one witness as to the proper amount to be given to the plaintiffs for counsel fees for defending the suit, or writ of injunction. This witness fixed the amount at \$150, and we cannot say that the Court erred in giving judgment for this amount only. There is, however, an exception taken by plaintiffs to the opinion of the Court refusing to compel *Caleb L. Swayzé*, one of the defendants, to give testimony in this case. Under our Code of Practice and laws of evidence we know no other mode of compelling a party to a suit of giving testimony than by interrogatories on facts and articles. This is similar to the Chancery practice, and established by positive provisions of our Code of Practice, but is unknown to the rules of evidence of the Common law.

The judgment of the District Court is, therefore, affirmed, with costs of this Court to be paid by appellant.

OLIVER
v.
MOUTON ET AL

the rule, not to dismiss an injunction when we believe that the plaintiff would be immediately entitled to the same remedy. See the case of *Exiniceas v. Dies*, 8d N. S. 480; *Chambliss v. Atchison*, 2d Ann. 488; *Dorsey v. Hills*, 4th Ann. 107; *Gillespie v. Police Jury*, 5 Ann. 406.

If the accused has been fairly tried and acquitted, which we do not understand to be denied by the counsel for the State, the State has no further claim under the recognizance, although it may have ripened into a judgment. See 7th An.

We have concluded to remand this case, with leave to both parties to amend; but as the costs attending this disposition of it are attributable to the plaintiff's neglect, relief is granted to him upon condition that he shall pay those costs.

It is ordered that the judgment be reversed, and the case remanded for further proceedings, with leave to both parties to amend, the plaintiff paying all the costs incurred up to this date.

GOVERNOR OF LOUISIANA v. THEODORE FAY.

Allowing and fixing the amount of bail are judicial acts, which the Executive is prohibited from doing by the second article of the Constitution.

The power to bail is not incidental to the power of granting reprieves.

So long as the opinion of the majority of the Court, in *The State v. Longworth*, prevails, a party convicted of a bailable offence, may be released by Habeas Corpus, after final judgment.

The rule, that in whatever manner a man binds himself he shall remain bound, may be true in mere conventional obligations, but in criminal cases no bonds are obligatory except those taken in pursuance of law.

A PPEAL from the District Court, parish of St. Mary, *Voorhies, J. E. Simon, jr.*, District Attorney, and *E. Simon*, for plaintiff. *Tucker & McGill*, for defendant and appellant.

Plaintiff's counsel filed the following brief:

Alexander Brette was convicted of *manslaughter* in the parish of St. Mary, on the 4th of February, 1851, and on the 8th of the same month was sentenced to *seven years* imprisonment at hard labor in the penitentiary. He took an appeal, which was carried before the Supreme Court, at its September term, 1851, at Opelousas, whereupon the judgment appealed from was affirmed.

It appears that after the rendition of the judgment of the appellate Court, but before said judgment could be returned and recorded in the lower Court, *Alexander Brette*, assisted by his friends, and especially by the defendant in this suit, (his father-in-law) took certain steps to procure, or rather to secure, a reprieve and respite from the Executive of the State, in view of a definitive pardon, with the advice and consent of the Senate; whereupon, on the 5th of December, 1851, the Governor issued his warrant, addressed to the Sheriff of the parish of St. Mary, notifying the latter of the granting of a reprieve or respite to *Brette*, upon condition that he, *Brette*, should furnish his bond to the said Sheriff in the sum of \$10,000, with *Theodore Fay*, (the defendant) as security; the condition of the bond to be, that *Brette* should deliver himself up to the proper authority and comply with the terms of his sentence on the first day of March, 1852, or before, if required, should a full pardon be not granted to the said *Brette*, in conformity to law and the requirement of the Constitution. This could not be done, however, until the return and recording of the judgment of the Supreme Court in the lower Court for execution, and the convict kept the Governor's warrant in his possession until the first day of the term, when presenting himself in open court, he handed said warrant to the Sheriff.

On the 12th of January, 1852, (first day of the session of the District Court) the judgment of the Supreme Court was filed in the lower Court and ordered to be recorded and carried into execution, (see page 9) and on the next day (18th January,) the convict having presented himself in open court and placed himself in the custody of the Sheriff, it was ordered that the bond by him given for his appearance, and to abide by the decision of the Supreme Court (*Theodore Fay* was *Brette's* surety on that bond) be canceled and annulled. It appears that immediately after that proceeding the Governor's warrant was read in open Court; that the Sheriff observed to the Judge presiding, that *Brette* had presented to him a reprieve from the Governor, but that the Judge very properly answered that *the Court had nothing to do with it*,—that the matter was ended in the Court by whom the sentence had been pronounced. The convict was in the custody of the Sheriff, who, in compliance with the Governor's warrant, required him to execute the bond sued on, with the defendant as his surety, and *Brette*, after having furnished said bond, as contemplated in the warrant, was set at liberty.

Governor of La.
v.
Fay.

The bond sued on was taken by the Sheriff strictly in conformity with the terms of the Governor's warrant, and stipulates the condition in the *very words* used by the Executive in granting the reprieve, and it must seem clear that the *defendant's name* was inserted in the warrant as being the surety who was to bind himself as such with the convict, in consequence of his having previously given his consent to becoming such surety; nay, of his having assisted his son-in-law in obtaining the respite in consideration of which the obligation sued on was contracted. The respite had its effect after the execution of the bond; the defendant had his eyes open when he signed it; he well knew its object; *he willingly consented to become bound as surety*, and it is indeed a strange position on his part to contend that the Governor of the State, from whom the reprieve or respite was obtained, and who had the constitutional power of granting it, had no authority to require and receive the bond without which the sentence of the law would have been carried into effect, and without which the convict would have been deprived of his liberty.

The action of the Senate was subsequently required by the Governor on the reprieve granted to *Alexander Brette*, but the pardon was refused by a very large majority; and on the 5th of February, after due communication made to the Governor by the Secretary of the Senate, official information thereof was given to the Sheriff of the parish of St. Mary, with instructions to take due notice thereof and to govern himself accordingly; this notification was accompanied with a letter of the Attorney General to the Sheriff, giving him his views on the subject, whereupon the latter, after diligent search for the convict within the limits of his parish, and due demand made of the defendant, as said convict's surety on the respite bond, come to the conclusion that *Brette* had either absconded or fled, to avoid the sentence of the law, and made his return to the Governor accordingly.

This suit is brought to recover of the defendant the sum of *ten thousand dollars*, which is the amount of the bond or obligation by him voluntarily subscribed with *Alexander Brette*, a penitentiary convict, for the purpose of allowing the latter the enjoyment of his liberty, and the benefit of the constitutional right of giving bail to await the final action of the Senate on the reprieve granted by the Governor. This bond has had its effect, but the condition under which the obligation was contracted has not been complied with, and the undersigned contends that said defendant, as the surety of the absconding or fleeing convict, has become liable for the payment of the obligation sued on.

The defendant has filed an answer, which he calls his peremptory exception to plaintiff's demand, and which amounts to this: 1st, That the instrument sued on was taken in a case *not bailable*. 2d, That said instrument is a bond given for an *illegal and immoral consideration*, and one reprobated by law. And, 3d, That the Governor had *no power to require*, nor the Sheriff *to receive or accept* such an instrument as the one sued on—said instrument being not a bond or obligation known to or recognized by the laws of the State; and that the Sheriff had no power or authority, on receiving said instrument, to liberate the prisoner from his custody. Wherefore, he prays that the suit be dismissed and that the instrument or bond sued on be declared null and void.

On these pleadings, the Judge *a quo*, without disclosing any of the reasons upon which he may have based his judgment, but simply finding that the law

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and evidence are in favor of the defendant, adopted the latter's conclusions, and from that judgment the undersigned, representing the State, has appealed.

I. One of the exceptions set up is: *That the instrument sued on was taken in a case not bailable.* I presume this exception will not be insisted on by the defendant's counsel, but if it is, it will be sufficient to refer him to the decision of this Court in the case of *Ex parte Longworth*, 7 Ann. Rep. 6, based upon the 108th Art. of the Constitution, which provides that "*all persons shall be bailable by sufficient sureties, unless for capital offences,*" &c. In that case, this Court, after reviewing a great number of authorities applicable to the question under consideration, seems to entertain the opinion, not only that the Constitution allows to a prisoner the right of being bailed *after conviction* during the pendency of the appeal, but that the right extends also to a convict, the execution of whose sentence is suspended by the interposition of the Executive until the action of the Senate on the reprieve or respite which he may have obtained. "In England," says this Court, "a person improperly convicted was released not by a new trial, but by the King's pardon, and no doubt might be bailed until the pardon could be obtained." *A fortiori*, should he be bailed here, when the benefit of a respite has been constitutionally allowed him by the Executive, subject to the pardon being granted with the advice and consent of the Senate. Under the Constitution, our Legislature cannot meet regularly but once every two years; thus the convict would be obliged to wait sometimes two years before the action of the Senate could be had upon his reprieve. This was one of the considerations operating upon this Court in the case of *Longworth*, for, as therein expressed, the prisoner might be in bad health, and *might perhaps be deprived by death of the Executive clemency, if detained in the parish prison two years before he could enjoy it.*

The bond or obligation sued on is anterior to the law of 1852. At the time it was given, there was no legal restriction or impediment to the full exercise of the right of being allowed to give bail, as provided for in the Constitution, and the reprieve or respite once granted to *Brette*, it followed as a constitutional right, that although convicted and sentenced, his bail by sufficient sureties could not be refused; his offence had ceased to be a capital one; it had become *bailable*, to wit: one for which the party had the right to avoid being detained in prison, on giving the security required; and if so, as recognized by this Court in the case of *Longworth*, it is clear that the right was properly exercised by the convict, after the Sheriff was notified of the reprieve or respite granted by the Governor.

II. *That the instrument sued on is a bond given for an illegal and immoral consideration, and one reprobated by law.* The defendant's counsel will hardly insist upon this ground of his client's defence, and if he does, this Court will say with me that it comes from the latter with very bad grace. What! the defendant's obligation as surety of his son-in-law, then under the benefit of a reprieve or respite granted by the Governor, that his said son-in-law, after enjoying his full liberty during the suspension of his sentence, should deliver himself up to the proper authority and comply with the terms of his sentence, *should a full pardon not be granted to him*, is one contracted for an immoral consideration! What! the cause of the obligation, which was not only to secure the presence of the convict after the action of the Senate and the ultimate execution of the sentence, if the pardon was refused, but also to permit *Brette* to enjoy his liberty, to avoid being detained in prison for several months and to remain at home with his family, was an immoral one!! Is there anything repugnant to morality in the cause and object of this contract? Surely not: it was, on the contrary, not only moral, but very natural in the defendant to lend his aid to *Brette*, who was a member of his family, and to afford him, by contracting this obligation, the means of avoiding detention, and of obtaining a full pardon from the competent authorities of the State. For aught it appears, the defendant himself was instrumental in obtaining the Governor's reprieve; his name had been proposed, perhaps by himself, as the convict's surety; it was inserted in the Governor's warrant as such; and after having been *present in the transaction* the obligation sued on was subscribed by defendant, with a full knowledge of all the circumstances. There is clearly no more immorality or illegality in defendant's contracting this obligation than there would be in any one becoming the surety of any person either before or after conviction, under the Art. 108 of the Constitution, and the offence being bailable, as I have already shown, the consideration of the bond was one not reprobated by law.

III. This exception, to wit: *that the Governor had no power to require nor the Sheriff to receive or accept such an instrument as the one sued on*, has been strenuously urged in the Court below, where it has undoubtedly prevailed. It behooves me to show that the judgment appealed from is erroneous:—

By the 47th Art. of the Constitution, the power of granting reprieves for all offences against the State, *is vested in the Governor*. This power was exercised in the case of *Brette*, and from the moment the will of the Executive was made known officially to the Sheriff, the execution of the sentence of the law was necessarily suspended. The Sheriff was bound to obey the mandate or order of the Governor; he had no right to disregard it; and in complying with it, it is clear he could not be accused of acting in contempt of the authority of the Court by whom the warrant of execution of the sentence had been issued, as *all jurisdiction of said Court over the case and over the prisoner had ceased* from the moment said sentence was pronounced and ordered to be carried into effect. The Judge *a quo* was well aware that such was the position of his tribunal, when on being informed that *Brette* had presented to the Sheriff a warrant of reprieve from the Executive, he answered: *the court had nothing to do with it*. The Governor's warrant, issued in the exercise of the constitutional power of *granting reprieves*, is not a *Judicial proceeding*; it is, as expressed by the Judge *a quo*, foreign to the administration of justice, and out of the control of the Judiciary power; *Courts of Justice have nothing to do with it*; but yet, under the Art. 108 of the Constitution, and the interpretation adopted by this Court, in the case of *Ex parte Longworth*, the convict had the right of being bailed by sufficient sureties; the sentence was suspended, but the prisoner was constitutionally entitled to be liberated; and the question presents itself: who was to require and receive his bond with sufficient sureties? and who was to Judge of the sufficiency of the security?

I contend that the ordering and taking of the bond in a case of reprieve, to arrest the ultimate action of the Senate, in view of a full pardon of a bailable offence, must be one of the incidental powers belonging to the Executive, in the exercise of the power conferred upon him by Art. 108 of the Constitution. How could it be otherwise? The obligation is not to be given in the course of Judicial proceedings; it is foreign to the administration of justice; no Court has any jurisdiction to require it; it is not provided for by the criminal laws; the convict does not bind himself to appear before any tribunal, but only to deliver himself up to the Sheriff who, in such cases, is merely an Executive officer. Should not the Executive, then, when the reprieve is to be followed by liberation, have the power and authority to fix the conditions and the amount of the obligation under which such liberation is to take place, and to delegate the receiving of such obligation to the Sheriff, who, in not executing the sentence, by order of the Governor, is clearly acting under the immediate control of the Executive? In the case of *Longworth*, who was admitted to bail by order of this Hon. Court, your Honors delegated the same power to the Sheriff who had the prisoner in his custody—and why? Because the jurisdiction of the inferior Court had ceased by the appeal, and because the inferior Judge could not, after his refusal to bail the convict, act any further in the taking of the bond. There is no law that gives the Sheriff the power of receiving a bail *in criminal proceedings*, and yet this Court, *ex necessitate*, and in the exercise of their appellate jurisdiction, delegated it to the Sheriff! Why should it not be so in the case of a reprieve, when the convict is no longer under the control and jurisdiction of the Court, and when his conditional release is to be the consequence only of the constitutional action of the Executive?

But, besides the questions presented by the defendant's exceptions, and whether or not the Executive acted properly and legally in requiring the obligation sued on to be given by the convict, I maintain that said defendant is bound by the terms of the obligation by him voluntarily contracted, and that said obligation, having had its effect as originally intended, he has no right to be released from it.

The obligation sued on is a civil one, (it is not one provided for by the criminal laws of the State, nor is it one taken in the course of criminal proceedings) it is in the nature of an obligation with a penal clause. C. C., Art. 2113. It contains two distinct contracts—one on the part of the convict, to deliver himself up to the Sheriff and to comply with the terms of his sentence, which is the principal object of the contract, and the other on the part of both obligors, to pay \$10,000 as a penalty, if the principal object of the agreement is not car-

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GOVERNOR OF LA. ^{v.} _{FAY.} ried into effect. C. C. 2114. The principal obligation here is independant of the penalty, though the latter depends upon the performance of the condition, that is to say: of the main object of the contract. C. C. 2115. It is stipulated to enforce (*pour assurer*) or rather to secure the performance of the principal obligation. C. C. 2116. And the nullity of the penalty does not involve that of the principal obligation. C. C. 2119. If there be a lawful excuse for its non performance, such as inevitable accident, (death, for instance,) or irresistible force, the penalty is not incurred. C. C. 2116.

Now, the main object of the contract was to secure the presence of the convict at a certain period to comply with the sentence, the execution of which was suspended; this was the principal obligation; and on his failing to do so, the obligors were to pay the penal amount stipulated in the bond; this is the penalty. The advantage to be derived from it, or in other words, the consideration was the release of *Brette* from imprisonment and the right of enjoying his liberty until the final action of the Senate on the pardon applied for. The proposition was made to the Governor sometime before the contract was executed (5th of December, 1851,) it was adhered to by all parties; the defendant's name was inserted in the warrant as being the surety; and when the convict placed himself in the custody of the Sheriff, on the return of the mandate of the Supreme Court to the lower tribunal, his former appeal bond, also subscribed by the defendant as his surety, was canceled and annulled, and in compliance with the requirements of the Executive in his official warrant, the obligation sued on was *willingly* executed on the same day by the defendant. *Volenti non fit injuria*, is a maxim fully applicable to this case; so in the case of *Bradford v. Skillman*, 6 N. S. 123, it was decided that the surety on a twelve months bond cannot be discharged from responsibility on the ground that the law by virtue of which the bond was given, is unconstitutional. The Court said: "The plaintiff *willingly* became the *bondsmen* of a willing purchaser, and executed a bond, in the nature of a recognizance, on which he knew execution would issue *de plano*. It appears to us he cannot complain, *volenti non fit injuria*." In the case of *Police Jury v. Sherburne*, 17 L. R. 345, it was decided that the sureties on a bond given by a Sheriff for the collection of the parish taxes, *cannot contest the legality* of the ordinances of the Police Jury making the assessment. By receiving the tax roll and executing the bond, the Sheriff and his sureties *recognized the authority* of the Police Jury. It is too late to contest the validity of these ordinances after having acted under them. See also 8 R. R. 196. Here, again, *volenti non fit injuria*, the convict had the benefit of the effect of the bond, the obligors by executing the obligation, recognized the authority of the Governor; and it is now too late to contest the said authority, and to contend for the nullity of an obligation, under the shield of which, the time during which the prisoner was to enjoy his liberty, was permitted to run out, and the convict was enabled to make his escape, in defiance of the obligation he had contracted, and of the criminal laws of the State. In the case of *Longworth*, this Hon. Court was impressed with the truth and weight of the observations of the Attorney General, that the construction they were obliged to give to the Art. 108 of the Constitution might conflict with the best interest of society by enabling a wealthy criminal to escape justice by means of his property; here, it is worse; for the object of the defendant in endeavoring to avoid the responsibility he has incurred, is nothing more or less than an attempt to secure forever the impunity of a heinous crime, and to screen the convict's property from the reach of our criminal laws. Such, I hope, will not be the result of his endeavors.

It is a well known legal rule that when a man becomes the surety of a married woman in a contract in which she is not authorized by her husband, the nullity of the principal obligation will not release him, he shall be bound. The same rule also governs in the case of the surety of a minor; the latter may not be obligated by his contract, but the surety is bound. Why, then, should not the defendant be bound by the obligation sued on? He contracted it *willingly*, with his eyes open, with a full knowledge of all the circumstances; it matters not as to the form of his contract, whether it is called a *bond* or any other form, it contains an obligation, the nature and the object of which he was well aware of, and if it be true that every engagement entered into for a good and lawful consideration is *binding*, whatever be its form. (*Dunbar v. Owens*, 10 R. R. 140,) I feel confident the State will recover the amount sued for.

Defendant's counsel filed the following brief:

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This is an action brought by the State to recover from the defendant the sum of \$10,000, the penalty of a bond signed by him as the security of one *Alexander Brette*, which was given under the following circumstances, as particularly detailed in the petition, to wit: On the 4th of February, 1851, in the District Court of the parish of St. Mary, *Brette* was convicted of the crime of manslaughter, and sentenced to seven years' imprisonment at hard labor in the Penitentiary, and to pay the costs of prosecution. He appealed to the Supreme Court, and during the pendency of the appeal went at large under a bail bond, taken by order of the District Court. The judgment was affirmed by the Supreme Court, and on the mandamus being read in the lower Court, and ordered to be executed, *Brette* appeared in open Court, and delivered himself into the custody of the Sheriff, whereupon his said bail bond was canceled of record.

The Sheriff had been notified of the reprieve of *Brette* by the Governor, by the following communication from the Executive Department, which was in his hands at the time *Brette* was in custody. As this communication forms a material part of the case, and is relied on by the State as vesting power in the Sheriff to take the bond and to liberate the prisoner, we give it at length in our brief:—

EXECUTIVE OFFICE, BATON ROUGE, }
December 5, 1851.

To the Sheriff of the parish of St. Mary :

Whereas *Alexander Brette* was tried and convicted before the Fourteenth Judicial District Court, on the 4th of February, 1851, of the crime of manslaughter, and sentenced on the 8th of the same month to seven years' imprisonment at hard labor in the Penitentiary, with costs of prosecution :

Now, be it known that for good and sufficient reasons, I do hereby grant a reprieve or respite to the said *Alexander Brette*, until further consideration of his case, upon condition that the said *Alexander Brette* shall furnish bond and security to the Sheriff of the parish of St. Mary in the usual form, in the sum of \$10,000, with *Theodore Fay*, of said parish, as security, the condition of which bond to be that the said *Alexander Brette* shall deliver himself up to the proper authority, and comply with the terms of his sentence, on the 1st day of March, 1852, or before, if required, should a full pardon be not granted to said *Alexander Brette*, in conformity to law and the requirements of the Constitution.

Given under my hand, and the seal of the State, &c.

By the Governor:

L. S.

(Signed)

JOSEPH WALKER.

CHARLES GAYARRE, Secretary of State.

Acting under the authority herein communicated, the Sheriff, on the 18th of January, 1852, took the bond which forms the subject of this suit, and liberated the prisoner, *Brette*, from his custody, who has ever since been at large.

The bond is in the usual form, made payable to the Governor, and in other respects conformable to the terms of the above communication.

The Senate refusing to concur in the pardon recommended by the Governor, the fact was officially notified to the Sheriff, whereupon he made an unsuccessful search for the body of *Brette*, and made return accordingly.

The defendant resisted the payment of the penalty of the bond on the following grounds, as set forth in his answer or peremptory exception to the plaintiff's action, that—

1st. The instrument sued on was taken in a case not bailable, and without any legal authority.

2d. The Sheriff had no power to receive the bond and liberate the prisoner, *Brette*, from custody, and in doing so he acted without authority and against the law.

3d. The mandate from the Governor to the Sheriff was unauthorized, and clothed him with no power to take the bond and liberate the prisoner.

4th. The said instrument was not a bond or obligation known to or recognised by the laws of this State, and could not be enforced against the principal or this defendant, his security.

5th. From the face of the instrument, as recited in the plaintiff's petition, it was given for an illegal and immoral consideration, one reprobated by law and in contravention of the same.

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6th. The Governor and Sheriff were alike without authority to demand or accept such an instrument as the one sued on, and the same is void.

Wherefore defendant prays that this suit be dismissed at plaintiff's cost, and the instrument or bond sued on be declared null and void, and for general relief, &c.

Upon this issue the case was tried on its merits, and judgment was rendered in conformity to the defendant's prayer, from which the State has appealed.

The validity of the bond, and the consequent right of the State to recover the penalty from the surety, depends mainly upon two questions:

1st. Whether the Sheriff, by virtue of the authorization of the Governor, or by virtue of any power vested in him by law, had authority to accept the bond and liberate the prisoner from his custody.

2d. If he had the requisite authority, then, whether the bond is not viciated by the illegality of the cause or consideration for which it was given.

I. It will scarcely be seriously contended by the counsel for the appellant that the Sheriff had any power to receive the bond, except what he derived from the mandate of the Governor. In the case of *Slocum et al. v. Robert* (16 L. R. 173) it was held that in case of judicial bonds taken by the Sheriff from persons in his custody, "he has no power to take any other bond but that which he is authorized by law to take." That was a bond taken in a civil proceeding, where the prisoner was in the custody of the Sheriff under a writ of arrest, and taken under article 224 of the Code of Practice. And all the cases wherein the Sheriff is authorized to take a bond from persons in his custody are civil cases, the law prescribing the conditions of the bond, and the Judge fixing the amount of the penalty, so that what is done by the Sheriff is merely ministerial. In criminal cases, however, he has no power to take any bond except as ordained by the Judge. (*State v. Jones*, 3 An. 10; *State v. Longeneau*, 6 An., 700; *State v. Nyati et al.*, 6 An., 701.)

But has the Governor the power to take the bond, or to authorize the Sheriff to take it? We say he has not. If he has such power, it must be derived from one of these three sources—first, from the express terms of the Constitution or the statutes of the State; second, by necessary implication, in order to exercise some power expressly granted, or third, it must result from the nature of his office.

There is no statute granting this power, or in any way relating to it. The articles of the Constitution defining the powers and duties of the Governor do not touch it. Article 38 vests in him the "supreme executive authority of the State." By Article 55 it is made his duty "to take care that the laws be faithfully executed." Article 47 gives him power to grant reprieves for all offences against the State, and except in cases of impeachment, with the consent of the Senate, to grant pardons and remit fines and forfeitures after convictions." There is certainly no such power expressly granted in any of these articles, or in any other in the Constitution.

But the power to let to bail is claimed to be necessary in order to exercise the reprieving or pardoning power granted by Article 47. This necessity, we suppose, (to have any effect) must be a legal necessity—such as would render nugatory the power to reprieve or to pardon, without exercising the power to bail, which, in that case, would be properly considered as a latent or implied power. But does any such necessity exist? Cannot the convict whom the Governor thinks proper to reprieve and pardon, remain in the custody of the Sheriff, or in the parish prison, until the action of the Senate can be had, as well as go at large? True, it would be less for his comfort and convenience, but the comfort or convenience of the prisoner cannot amount to a legal necessity for the exercise of a power not expressly granted. Nor is the question to be effected by the right of bail secured to the prisoner by Article 108 of the Constitution, as interpreted by this Court in the late case of *Ex parte Longworth*, 7 An.

That case, while it maintains the right of the prisoner to be bailed, even after conviction, does not intimate that the bail is to be granted by the Governor, but it clearly shows that that power is to be exercised by the Judge. If there was a legal necessity for bailing the prisoner, or if he had a constitutional right to be bailed during the pendency of his pardon before the Senate, the bail should have been granted by the Judicial, and not the Executive authority, upon the presentation of the reprieve under the signature of the Governor and the seal of the State. This would be in conformity, as near as the difference of circum-

stances would permit, with the mode of taking advantage of the King's pardon in England, which is, "to procure the King's sign manual or privy seal, signifying his Majesty's intention to afford a pardon to the prisoner, either absolutely or conditionally as the case may be, and directing the justices of the goal-delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that shall come out. This mandate the justices obey, taking security, if the pardon is conditional, for the performance of the stipulation upon which it is granted, and afterwards issuing their warrant to the goaler for his discharge." (4 Hawkin's P. C., 361.)

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It is in conformity to the principles of the English law, as well as of our own, that the bail be granted and the bond received by a judicial, and not a ministerial officer. The King does not grant the bail himself, nor issue his mandate to that effect to the Sheriff of the shire, but to the justices of the goal-delivery.

But, lastly, does the right of the Executive to let to bail in such cases result from the nature of the Executive office? So far from it, the granting of bail is quite incompatible with the duties of the Governor, as prescribed and limited by the Constitution.

Article 1 of the Constitution divides the government of the State into three departments—the Legislative, the Executive and the Judicial. Article 2 provides that "no one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Article 62 vests the Judicial power in the Supreme Court, in District Courts, and in Justices of the Peace. Hence it is clear that the Governor cannot do any judicial act. But it has been decided by this Court, in the case of *The State of Louisiana v. Jones*, (3 An. 10) that "the granting of bail and determining the amount in which the parties shall be bound, are judicial acts." The duties and powers of the Governor, as well as of the Sheriff, are purely ministerial. The granting of bail by the Governor, in the case at bar, was exercising power properly belonging to the Judiciary, and was, therefore, in direct violation of the prohibition contained in Article 2 of the Constitution.

The proposition, then, appears to be clear, that there was no authority whatever, either in the Governor or the Sheriff, to take the bond; but that they were, on the contrary, forbidden by Article 2 of the Constitution to do so. The case, then, does not differ from the case where a Justice of the Peace or a Parish Judge assumes to take a bond without authority, except that the case at bar is much stronger against the pretensions of the State, this bond having been taken without any color of judicial authority. But it has often been held by this Court that "a bail bond taken by a magistrate, in a case in which he is prohibited by law from admitting the party to bail, is void, and the State cannot recover on it." (*State v. Herbert*, 10 R. R. 41; *State v. Jones*, 3 An., 10; *State v. Harper*, 3 An., 598; *State v. Hays*, 4 An., 59.) Whatever is done in contravention of a prohibitory law is void. (C. C. 12.)

II. But supposing there was the necessary authority in the officers who let the prisoner (*Brette*) to bail, is not the bond viciated by the cause or consideration for which it was given? We think it is.

The governor grants a reprieve or respite to the prisoner upon the express "condition that he shall furnish bond and security to the Sheriff of St. Mary, in the usual form, in the sum of \$10,000, with *Theodore Fay*, of said parish, as security." The giving of the bond, then, was the price paid by the prisoner for the reprieve or respite granted by the Governor, and for the privilege of going at large. The Governor had the discretionary power to grant the reprieve or not, according as he might judge of the merits of the application; but we submit that he had no right to append any such condition to the exercise of that power. It amounts in effect to a commutation of the sentence from imprisonment for seven years in the Penitentiary to the payment of \$10,000 fine—an arrangement which, however good as a financial operation on the part of the State, but illy comports with a just regard for public morals, or with the Constitutional power of the Executive. The power to grant a reprieve or pardon does not imply a power to commute a sentence of imprisonment to the payment of a sum of money. If it did, it might be no difficult matter for the rich to "buy out the law," and thus to "go unwhipped of justice." If it had been designed to lodge such power in the Executive, it would have been expressed in the Constitution, and the price of every reprieve or pardon should have been fixed by a regular fee bill. If the State should be permitted to recover in this

GOVERNOR OF LA. action, it might in truth be said that *Brette* had bought his liberty at the price of \$10,000, and the State has received the money!

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III. This leads us to consider a point relied on by the counsel for the State, to wit: that although the bond may have been taken without authority, yet it is good as a voluntary obligation; in other words, that the bargain entered into between the prisoner (*Brette*) and *Fay*, his security, on the one part, and his Excellency, the Governor on the other part, by which the former undertook and agreed to pay, in a certain contingency, the sum of \$10,000, in consideration that the latter should grant *Brette* a reprieve, and permit him to go at large, is good and binding on the security, as a voluntary obligation, although the Governor had no legal power to contract in the premises. It is a sufficient answer to this proposition that this Court has held in numerous cases that "a bail bond taken by a magistrate without authority, is void, and the State cannot recover on it." (See cases above cited.) This bond lacks one of the essential elements of a valid agreement, to wit: "*parties legally capable of contracting.*" (C. C. 1772.) Without legal authority to receive the bond, the Governor had no legal capacity to bind the other parties. The maxim invoked in the Court below by the counsel for the State, that "in whatsoever manner a man binds himself, he shall remain bound," it was decided by Judge Martin, is not true in "judicial bonds taken by the Sheriff from persons in his custody." (*Slocum et al. v. Robert*, 16 L. R., 173.) The fact that *Brette* has enjoyed the benefit of the bond and escaped the walls of the prison can not cure the defect of authority. It was a dereliction of duty in the public officer in granting him his liberty, for which, doubtless, he would be punishable under the common law, as for an escape. (3 Hawkins's P. C., 254 and 157.) But the validity of the bond is to be tested by well established principles of law, which are not to be affected by any accidental advantage or disadvantage that may have accrued to any of the parties concerned. Public officers must act under authority of law, in order to give validity and binding effect to their acts, especially in criminal proceedings; and as there is no color of authority for receiving the bond in the case at bar, we trust the Supreme Court will find no difficulty in affirming the judgment of the Court below.

Rost, J. There is no error in the judgment in this case. The allowing of bail and the determination of the amount in which the parties are to be bound, are judicial acts which the Executive is prohibited from doing by the second Article of the Constitution of the State. The power to bail is not incidental to the power to grant a reprieve. See *State v. Jones*, 3 An., page 10.

The argument that the Court is wholly divested of jurisdiction after a final judgment, is inapplicable to a case of bail, so long as the opinion of the majority of the Court in the case of *The State v. Longworth* prevails. The party entitled to be bailed may be relieved by habeas corpus. See 7th An., page 247.

It is said that the defendant, *Fay*, signed the bond with his eyes open, and the rule "*volenti non fit injuria*," has been earnestly pressed upon us. This was a favorite maxim of the late Judge Martin, but he took care to limit its application to civil cases. In the case of *Slocum et al. v. Robert*, which was that of a bail bond, he remarked: "It has been urged that we have often said, that in whatever manner a man binds himself he shall remain bound. This may be true in mere conventional obligations, but not in judicial bonds, taken by the Sheriff from persons in his custody; in such a case the Sheriff has no power to take any other bond but that which he is authorized by law to take." 16th La., 174.

We take this to be sound doctrine, at least in criminal cases, and as no law authorized the Sheriff to take the bond sued upon, no recovery can be had upon it.

The judgment is affirmed, with costs.

CHARLES GRAVENBERG v JOSEPH SAVOIE.

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The plaintiff in a petitory action is not bound to show title in himself good against the world. He is only required to produce a title as owner "*causa idonea ad transferendum dominium*," to repel the presumption of ownership, resulting from mere possession; and the date of his title ought to be anterior to the possession of the defendant.

Property conveyed to the husband, in lieu of a sum of money inherited by the wife, is paraphernal.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Gibbon and Simon*, for plaintiff. *Wilson & McClarty*, for defendant and appellant.

DUNBAR, J. This is a petitory action, commenced on the 5th of April, 1847. The plaintiff claims to be the lawful owner and possessor of three certain tracts of land on the Bayou Teche, in the parish of St. Mary, having a front of about thirty arpents on each side of said bayou, with the ordinary depth of forty arpents. He says that he has been disturbed in his possession by the defendant, who has forcibly entered upon a portion of said land, built a small house upon the same, and refuses to leave the premises. The petitioner prays for an Injunction to prevent the cutting of timber, waste, &c., and that he may be quieted in his title and possession. The defendant, to this petition, filed two answers. In the first, filed 14th June, 1847, he sets up a general denial, and further states, "that on the 30th of March, 1847, he filed in the Land Office at Opelousas his declaratory statement of pre-emption and proof to Fractional Section 53, Township 13, South of Range East in Southwestern District of Louisiana; and on the 18th of April, same year, tendered payment for the land at said office, which was refused; that a protest had been filed by plaintiff, and that he, the said defendant, is a bona fide settler on said land, which is public, and that he is justly and legally entitled to a pre-emption right thereto. On the 29th of Jan'y, 1851, the defendant filed an amended answer, in which he sets up that he is now the owner, and was at the inception of this suit, of the said Fractional Section 53 in Township 13, containing one hundred and twenty acres and two hundredths, and prays to be quieted in his title. The case was tried by the District Judge, without the intervention of a Jury. Judgment was rendered for the plaintiff, and the defendant has appealed.

On the trial of the cause, the defendant introduced in evidence the Receiver's receipt and Register's certificate of the Land Office at Opelousas, for his purchase of Fractional Section No. 53, containing one hundred and twenty acres and two hundredths. From the surveys and other evidence, it appears that the land thus purchased from the United States is on the East side of the Bayou Teche, within the limits of the lands claimed by the plaintiff. It therefore follows that to entitle the plaintiff to recover the land in dispute, he must show an older and better title than the defendant.

The plaintiff, who is the owner of a large sugar plantation on both sides of the Bayou Teche, composed of several tracts of land, traces his title to the land in dispute through various mesne conveyances to one *Catharine Toussart, femme Loisel*. The said *Catharine Toussart*, on the 9th of June, 1784, being then owner of a tract of land fronting on the West side of the Bayou Teche, containing fifty arpents front, at a place called the "*Chicot Noir*," and having no wood-land, on the West side of the Teche, or Thievas it is written in the requête obtained from the Spanish Governor on the recommendation of the Commandant, an order of survey for the same quantity of land on the East side

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of the said bayou, or river. She then, on the 21st of December, 1795, claiming to be the owner of the lands on both sides of the Teche, sold to *Pierre Etier*, her son-in-law, for his wife, *Victoire Borel*, ten arpents front of said land, on both sides of the Teche. It is proper here to remark, that this tract thus sold appears from the surveys and certificates of confirmation to be in the centre of the two large tracts of fifty arpents front on both sides of the Teche, claimed by *Catharine Toussart*. On the 18th of November, 1801, *Pierre Etier* sold to *Wm. Desk* the lower half of said tract, being five arpents front on each side of the bayou. Several years afterwards, *William Desk* sold his portion of the said land to one *P. F. Oyon*, and the latter sold back to *Pierre Etier*, who thus became again the owner of the whole original tract of ten arpents front on each side of the bayou, which had been previously sold to him for his wife, *Victoire Borel*, by her, the said *Catharine Toussart*. The lower half of the said ten arpents front on the East side of the Bayou Teche being the land entered by the defendant, and now in dispute in this suit.

On the map of the Township in evidence, it is put down as land claimed by *Wm. Desk*, bounded above by land of *Pierre Etier*, confirmed by Commissioner's certificate B, No. 1581, and below by land of *François Prevost*, confirmed by commissioner's certificate A, No. 1861. By reference to the certificate B, No. 1581, it appears that the United States Commissioners, on the 28th of September, 1811, confirmed *Pierre Etier* in his claim to four hundred superficial arpents, having a front of five arpents, with the depth of forty on each side of the Teche, founded on settlement and occupancy by *Catharine Toussart* for more than ten consecutive years previous to the 20th of December, 1808, represented in a plat of survey filed with the claim, to be bounded on the upper side by land of *Nicolas Prevost*, and on the lower side by land of *Wm. Desk*. By reference to certificate B, No. 1861, we find that on the 28th of August, 1811, the United States Commissioners confirmed *François Prevost* in his claim to a tract of land containing three hundred and thirty-eight American acres, founded on an order of survey in favor of *Catharine Toussart* for fifty arpents in front by the depth of forty arpents, bearing date the 27th of July, 1784, signed by *Miro*, the Governor of the Province of Louisiana, with proof of settlement, on and previous to the 1st of October, 1800, in the county of Attakapas, on the East side of the Bayou Teche, of which the part confirmed is for the ten arpents in front on the said bayou, with forty arpents in depth, bounded on the upper side by the remainder of the same original tract now claimed by *William Desk*, and on the lower side by land of *Antoine Bonté*. Here then the United States Commissioners, by two acts of confirmation, in 1811, more than forty years since, recognised the title of *Catharine Toussart* to the tract of fifty arpents front on the East side of the Teche, by settlement and occupancy, and under the order of survey granted to her by Governor *Miro*, on the 9th of June, 1784, and confirmed the title to the tracts of land of *Pierre Etier* above, and *François Prevost* below the land claimed by *Desk*.

It is difficult to understand how the title to the tracts of land both *above* and *below* the *Desk* tract—all of them being in the *Toussart* claim of fifty arpents front on the East side of the Teche—could be recognized and confirmed by the United States Commissioners without their recognizing and confirming, at the same time, the intermediate tract claimed by *William Desk*. By reference to the proceedings of the Board of Commissioners, on the 1st of May, 1815, by Report No. 39 and Report No. 41 and 42, on the *Desk* claim, it will be seen that the Commissioners declared that *William Desk* claims five arpents front by the

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depth of forty, on the North, and five arpents front with forty-two arpents in depth on the South side of the River Teche, the part on the South or West side proceeding from a concession to *John Bte. Duhon*, and sold by him to *Madam Loisel* (Widow *Borel*) or *Catharine Toussart*, by her to *Pierre Etier*, and by him to the claimant, *William Desk*. The five arpents front on the East side of said bayou being claimed by *William Desk*, under the title or order of survey to *Catharine Toussart*, wife of *Loisel*, by Governor *Miro*, dated the 27th of July, 1784, for fifty arpents front by the depth of forty, on the East side of the River Teche, which is filed in the claim of *François Prevost*. That the necessary deeds of conveyance are filed, and sufficient proof of occupancy. But they go on and declare that the land claimed by *William Desk*, on both sides of the Teche, had been already confirmed to him by the Commissioners by certificate B, No. 1440 or 1548, and conclude that it is not necessary to confirm his claim over again. This was a gross and palpable mistake, and has been the cause, in all probability, of the present contestation. By reference to these two certificates, it will appear that the land on the *West side* of the Teche, here referred to, under the order of survey, to *Jean Bte. Duhon*, bearing date the 24th of June 1778, with settlement on and previous to the 1st of October, 1800, was confirmed to *William Desk*, but on examining certificate B, No. 1548, it will be seen that the land embraced in that certificate is for eight hundred arpents on the *West side* of the Teche, under a different order of survey from that mentioned in said Reports above referred to, at a different place called the Oak Point, and appears to be entirely a different tract of land. It is further shown that the plaintiff purchased of the United States Government the back concession or pre-emption of the *Desk* tract and the adjoining tracts, both above and below. He offered in evidence a plat of survey by which it will be seen that on the 16th of April, 1842, the Surveyor General of Louisiana approved of the survey of the land purchased by the plaintiff as front proprietor of the *Desk* tract now in dispute, and the *Pierre Etier* tract above, and the *François Prevost* tract below; which survey was approved nearly seven years previous to the purchase of the defendant. Indeed the purchase from the U. S. Government of the back concession by the plaintiff must have been made not later than the 15th of June, 1836. See act of Congress, approved 24th of February, 1835, being supplementary to the act entitled an act to authorize the inhabitants of the State of Louisiana to enter the back lands. See also act of June 15, 1832, Statutes at Large, 4th vol., 753, 584. It was as front proprietor, then, or owner of the *Desk* tract as far back as the 15th of June, 1836, that plaintiff purchased of the United States the back concession of the *Desk* tract. This, we consider was an admission or acknowledgment on the part of the Government, (nearly thirteen years previous to the purchase of the defendant on the 18th of January, 1849, of the register at Opelousas,) that the plaintiff, *Charles Gravenberg*, was the owner of the *Desk* tract "under a claim confirmed by the commissioners appointed for the purpose of ascertaining the right of persons claiming lands in the State of Louisiana." We have therefore come to the conclusion, from all the facts in this case, that it has been satisfactorily established that the *Desk* tract was not public land on the 18th of January, 1849, and therefore not liable to entry; that the defendant, *Joseph Savvie*, could acquire no right by his purchase, and that said purchase was absolutely null and void. *Morrison v. Whetstone*, 5 Ann., 686.

But it is urged by the counsel for defendant that the plaintiff has failed to make out a chain of title to the land in question from *Catharine Toussart*. We are not, however, able to discover any defect in the chain of title from *Cat*ha-

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rinc Toussart down to the plaintiff. The only seeming defect is in the sale of *P. F. Oyon* of this land to *Pierre Etier* and *Julie Prevost*, the widow *Etier*—the title from the latter not having been afterwards conveyed to the plaintiff. But it appears that the plaintiff claims under *Gabriel Fusilier*, who purchased this land from *Victoire Borel*, the widow of *Pierre Etier*, the daughter of *Catharine Toussart*, and for whom the said land had been conveyed by her mother by deed, bearing date the 20th of December, 1795, before referred to in this decision. The title to this land was then, and continued to be, in *Victoire Borel*, rather than in *Pierre Etier*, her husband; for, by reference to the deed, it will be seen that the conveyance of the land was made to *Pierre Etier* for the sum of money which his wife, *Victoire Borel*, was entitled to receive from the estate of her deceased father, *Pierre Borel*. Property conveyed to the husband, in lieu of a sum of money, inherited by the wife, is paraphernal. 1st La., 523. *Sovenat et al. v. LeBreton et al.*

We do not, however, consider that it is necessary for the plaintiff in this action to show title in himself good against the whole world. The plaintiff in the petitory action is bound to produce a title as owner "*causa idonea ad transferendum dominium*," to repel the presumption of ownership resulting from mere possession and the date of his title ought to be anterior to the possession of the defendant. *Bedford v. Urquhart et al.*, 8th La., 246. This we think, at least, the plaintiff has done.

There are circumstances, too, connected with the entry and purchase by the defendant of the land in dispute not calculated to impress us very favorably in his behalf. It is shown by the evidence that the plaintiff and those under whom he claims had been for many years previous to the entry of defendant, in the open and notorious possession of the land in dispute under title as owners. During the progress of the cause the plaintiff offered in evidence the testimony of witnesses to prove that the defendant had clandestinely in the middle of the night, built a small cabin on the tract of land in dispute, without the knowledge of the plaintiff who found the said cabin there the next day; that the defendant never cultivated said land, and well knew that the same was claimed, occupied and possessed by plaintiff, was part of his sugar plantation, and had been cleared as such, but the said evidence having been objected to by defendant's counsel, on the ground that the court could not look behind the certificate of the Land Office at Opelousas, was rejected; to which opinion of the court rejecting said testimony the plaintiff took a bill of exceptions. We do not consider it material to decide, from the views we have already taken of this cause, whether this evidence should have been admitted. It does, however, appear from the certificate of the Register at Opelousas, dated the 20th of December, 1849, that after diligent search in his office he has been unable to find the caveat or protest of the plaintiff against the pre-emption right of the defendant, or the original proof of the pre-emption right of the defendant, and that neither could be found in the files or records of his office.

The government has, however, given to the defendant a remedy to the extent of having his purchase money refunded to him. The act of Congress, approved the 12th of Jan'y, 1825, provides, "That every person, or the legal representative of every person, who is or may be a purchaser of a tract of land from the United States, the purchase whereof is or may be void by reason of a prior sale thereof by the United States, or by the confirmation or other legal establishment of a prior British, French or Spanish grant thereof, or for want of

title thereto in the United States from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for or on account of such tract of land, on making proof to the satisfaction of the Secretary of the Treasury that the same was erroneously sold in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money paid as aforesaid."

It is, therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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JOHN H. BARRET v. JAMES EMERSON et al.

Bona fide purchasers, who have advanced their money upon the faith of the proceedings of a Court of justice—a judgment, execution and sheriff's deed—who have possessed peaceably for many years—who have expended large amounts in improvements—will not be turned out of possession on account of mere informalities, at the instance of a party who shows no injury, and exhibits no equitable ground for relief.

The validity of a judgment for want of citation, cannot be attacked in the Supreme Court when it was not made a ground of action in the Court below.

APPEAL from the District Court, Parish of St. Mary, *Voorhies, J. Walker*, for plaintiff and appellant—cited *Delogny v. Smith et al*, 3 L. R. 418; *Mayfield v. Casnier*, 7 N. S. 185; 8 N. S. 246; *Morris v. Croeller*, 4 L. R. 150; *Spiller's Heirs v. Baumgard*, 4 L. R. 207.

Cork, for defendants. *Olivier*, for warrantor—cited *Copeland v. Labatut et al*, 6 A. 61; *Stockton v. Downey*, 6 A. 581.

SLIDELL, J. This action is brought by the plaintiff to annul a sale of real estate made by the Sheriff of the parish of St. Mary, in 1844, to *N. Labarthe* under a *fieri facias*, issued upon a judgment obtained by *N. Labarthe* against *Peyroux, Rivarde & Co.*, as third possessors, and by which a tacit mortgage upon the real estate was recognized. The defendant holds under the Sheriff's deed through various mesne conveyances accompanied by uninterrupted possession. Important improvements have been made since the Sheriff's sale. The plaintiff holds under a sale from *Peyroux*, one of the members of the firm of *Peyroux, Rivarde & Co.*, and who appears to have acquired the interest of his copartners. This purchase was made by the plaintiff in 1846.

The grounds for annulling the judicial sale alleged in the petition are :

"1st. That the writ upon which the said lots purport to have been seized and sold, was issued without authority of law, and was not a legal writ.

"2d. No notice of the seizure of said lots was served on *Sylvain Peyroux*, then sole owner of said lots, nor on either of the firm of *Peyroux, Rivarde & Co.*, nor on any person by them, or either of them, thereunto lawfully authorized. •

"3d. No notice to appear for the purpose of naming an appraiser was ever served on said *Peyroux, Rivarde & Co.*, or on either of the members of said firm, nor on any person by them or either of them thereunto lawfully authorized."

The petition contains no allegations, nor the record any proof, of any injury having been sustained by *Peyroux*, the defendant in execution, under whom the present plaintiff claims, in consequence of the informalities alleged; nor of any

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offer, on the part of the plaintiff, to warrant that the property, if resold, would bring a higher price than it did before; nor any tender of payment of the mortgage debt which incumbered the property before *Peyroux* acquired an interest in it, and for the satisfaction of which the judicial sale was made. Why should *bona fide* purchasers, who have advanced their money upon the faith of the proceedings of a court of justice, a judgment, execution and Sheriff's deed—who have possessed peaceably for many years—who have expended large amounts in improvements—be turned out of possession on account of mere informalities, at the instance of a party who shows no injury, and exhibits no equitable ground for relief? Such a result is inconsistent with repeated decisions which of late years this Court has felt it to be its duty to make. See *Cerion v. Millaudon*, 8d Annual, 668; *Sewell v. Payne*, 5th Annual, 260; *Copeland v. Labatut*, 6th Annual, 61; *Stockton v. Downey*, ib. 585. We are aware that those decisions are not in harmony with the jurisprudence which, for a time, prevailed in this State. But they were the result of careful reflection. We believed them to be a return to sound and equitable principles, which we thought had been lost sight of in a too rigorous regard for form. We found a sanction for them, not merely in natural equity, but in the jurisprudence of other enlightened countries; and we saw that the titles of many honest citizens had been rendered insecure, public confidence shaken, and the public prosperity affected by the temporary adoption of a contrary doctrine.

In the argument before this Court, the plaintiff's counsel attempts to raise another objection to the judicial sale, which was not alleged in the petition. The validity of the judgment itself is attacked here, on the ground of defect of citation. We are of opinion that the objection cannot be heard here, not having been made a ground of action in the Court below; and it is proper to add that the transcript does not afford us the proper means of considering the point suggested, inasmuch as the evidence contains only excerpts from the record of the suit of *Labarthe v. Peyroux, Ricarde & Co.*

Judgment affirmed—costs of appeal to be paid by plaintiff.

SOPHIE BLANCHARD, wife, &c., v. LUCIEN DECUIR.

Hypothecary action for a minor's mortgage founded on a judgment against the tutor. At the time the judgment against the tutor was obtained, the plea of prescription would have defeated the plaintiff—but the tutor did not set it up. *Held*—the renunciation of prescription by the tutor could not affect the right of defendant as third possessor, inasmuch as the defendant could at any time avail himself of the plea of prescription under Article 8429 of the Code.

A PPEAL from the District Court, Parish of St. Martin, *Voorhies, J.* JUDGMENT OF DISTRICT COURT.

The hypothecary action of the plaintiff is founded on a judgment rendered in her favor against her natural tutor, *Marin Blanchard*, on the 7th of October, 1850. On the 20th of December, 1846, when the citation was served on *Marin Blanchard* in that suit, the plaintiff was then upwards of twenty-nine years of age. Her right of action against her tutor was barred by the prescription of four years previous to the month of November, 1842. At that time her tutor had already been legally divested of his title to the land now owned by the defendant, on which she seeks by the present action to enforce her legal or tacit mortgage; to which the prescription of four and ten years are opposed by the defendant.

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It is well settled that the extinguishment of the principal obligation by prescription also carries with it the extinguishment of the mortgage as its accessory. The only question, therefore, presented in this case is whether the tutor by waiving the plea of prescription, which it cannot be denied he had the right to do, has reinstated or revived the mortgage on the property which had ceased to belong to him. So far as it relates to himself, there is no doubt but what the plaintiff's legal mortgage would take effect on his unincumbered property from the date of his renunciation, in the same manner as the reinscription of mortgages required to be recorded which are already prescribed, the mortgage to take effect only from the date of its reinscription; but if in the meantime other rights were acquired by third persons, it is clear that these rights could not be affected by the reinscription. In the present case the renunciation of prescription by *Marin Blanchard* could not, therefore, affect the rights of the defendant as third possessor, inasmuch as he could at any time avail himself of the plea of prescription which the tutor had renounced, under the provisions of article 3429 of the Civil Code. This article, which is identical with article 2225 of the Nap. Code, is clearly applicable, in my opinion, to cases of mortgages. Troplong, vol. 4, *Privileges et Hypothèques*, pp. 47, 66, Nos. 878 and following; Duranton, vol. 20, Nos. 144, 147, 148, 150, 152.

The grounds of objection urged by this defendant's counsel to the admissibility of the plaintiff's evidence, I do not think are tenable—if anything, the objection goes more to the effect than to the admissibility of the evidence—the objection is, therefore, overruled.

It is, therefore, ordered, adjudged and decreed, that the demand of plaintiff be rejected, at her costs.

A. Voorhies, for plaintiff and appellant. *E. Simon*, for defendant.

DUNBAR, J. It is ordered, that the judgment of the District Court be affirmed, for the reasons given by the District Judge, with costs.

SUCCESSION OF EDMOND DEJEAN.

Where an administrator placed upon the tableau, as privileged, a judgment which had been obtained on a prescribed note in a suit in which the prescription had not been pleaded, a mortgagee whose claim existed at the time the prescription accrued, may set it up against the judgment creditor.

It is not necessary to re-inscribe a mortgage, where the property has been sold at a succession sale and the proceeds reduced to possession.

The administrator had placed F. upon the tableau as a mortgage creditor, but ascertaining that the judgment was obtained on a prescribed note, moved for leave to strike off the claim. *By the Court*: The insolvent had an undoubted right to waive prescription; and after it had accrued, the natural obligation which remained was a sufficient consideration for the subsequent promise to pay. The judgment obtained on that promise is binding.

A PPEAL from the District Court, Parish of St. Landry, *Overton, J. Lataste*, for administrator, and *Swayze*, and *W. B. Lewis*, for *Dupré*. *Linton*, for himself. *King & Linton*, for *F. Dejean*.

ROSE, J. The judgment, under which the opponent *Felix Dejean* claims the first mortgage on the shares of the property of the deceased, coming to *Auguste Antoine* and *Evariste Dejean*, was obtained on a prescribed note and the claim of *Latie Dupré*, the other mortgage creditor of the same parties who opposed him, existed at the time the prescription accrued; the judgment in favor of *Felix Dejean* was rendered by default, and the waiver of prescription by the makers of the note is a matter of record; under that state of facts the waiver of prescription does not affect the right of *Dupré*, who was not a party to the proceeding, to plead it in the *concurso*. The mortgage in favor

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of *Déjean*, resulting from his judgment, can only take effect after the other is satisfied. *Felix Déjean* has made the point that *Dupré's* mortgage, which was recorded in 1839, has lost its rank for want of re-inscription.

Under our peculiar jurisprudence that a succession sale extinguishes all mortgages existing on the property in the name of the deceased; there are few cases in which a re-inscription would be necessary, after such a sale. In this case, however, the proceeds of the sale appear to have been reduced to possession in 1847, long before the expiration of ten years from the date of the original inscription, and no reinscription was necessary. See *Shepherd v. Orleans Cotton Press Company*, 2d An. 110, and the authorities there cited.

The administrator had placed *Felix Déjean* on the tableau as a mortgage creditor of the insolvents *Antoine, Auguste* and *Evariste Déjean*, when he discovered, in the course of the proceedings in *concurso*, that the judgment of *Déjean* had been obtained upon a prescribed note—he moved the Court for leave to amend the tableau by striking off that claim from it. The Court having over-ruled the motion, he took a bill of exceptions, and has brought the case before us by an appeal.

We are of opinion the Court did not err. *Antoine, Evariste* and *Auguste Déjean* had an undoubted right to waive prescription, and after it accrued the natural obligation which remained was a sufficient consideration for their subsequent promise to pay. The judgment obtained upon that promise is binding upon them, but can only be enforced after the claim of *Dupré* is satisfied.

It is, therefore, ordered that the judgment be affirmed, with costs.

EUGENE WARTEL *v.* P. DARBEIN et al.—MEUILLON, f. m. c., Intervenor.

Under Article 2456 of the Code, when the vendor retains possession, there is reason to presume that the sale was simulated. This presumption, however, is not conclusive—but throws on the vendee the burden of proving that the transaction was in good faith and the sale real.

APPPEAL from the District Court, Parish of St. Landry, *Cushman, J.*, presiding. *Garland & Lastrappes*, for plaintiff and appellant. *Déjean*, for defendant. *Martin*, for Intervenor.

SLIDELL, J. This case presents a controversy between an attaching creditor and a purchaser from the debtor. The latter was successful in the Court below.

The material facts are as follows: The plaintiff seized the slave in dispute under a writ of attachment against the defendant on the 14th April, 1852. On the 30th March, 1852, the defendant sold the slave to the Intervenor for \$900, which was paid in cash in the notary's presence; but this act was not recorded until the 15th April, 1852. The slave, when seized, was in the possession of the defendant's wife, and had been since the sale. The defendant seems to have gone to France with the intention of a temporary absence, expecting to return in the fall; such at least was the statement made to one of his acquaintances, to the intervenor, and to the plaintiff by letter, after his departure. His declaration was that he would return in the ensuing summer. The notary and other witnesses give the Intervenor an excellent character for truthfulness

and integrity, and he is shown to be in good circumstances. A witness states he told him, in a conversation about *Darbein*, that he would reconvey the slave to him on his return from France upon his repaying the price.

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It is said that under the article 2456 of the Code, the vendor's retention of possession affords reason to presume that the sale was simulated. This is true, but the presumption is not conclusive. It throws upon the vendee the burden of proof that the transaction was in good faith, and that the sale was real. This the purchaser did to the satisfaction of the District Judge, and an examination of the evidence has not satisfied us that his conclusion was erroneous.

But it is said that even if there was no simulation, the sale is inoperative for want of seasonable registry.

In *Monday v. Wilson*, 4 Louis. 341, it was said that the Act of 1810, which provides, "that no notarial act concerning immovable property shall have any effect against third persons, until the same shall have been recorded in the office of the Judge of the Parish where such immovable property is situated," (See Bullard & Curry's Digest, p. 596,) was not applicable to sales of slaves. We are not aware that this decision has been overruled. We prefer, however, not to determine the case on that point, the question being one of much importance, and our present means of research is limited. There is another point on which the case may be put; and that is, that even supposing registry to be necessary in case of sales of slaves, the intervenor is protected by the 2d section of the Act of 1839, which provides that all acts passed before any notary out of the parish of Orleans and filed, as required by the first section of that Act, within twenty days after their execution, shall take precedence of any other act passed in relation to the same property of a subsequent date, although first recorded, any law to the contrary notwithstanding. See Acts of 1839, p. 194, and Consolidated Statutes, p. 430, Nos. 13, 14.

Judgment affirmed, with costs.

JOSEPH V. BACON & SON v. THOMAS MASKELL.

The transfer and possession of a mortgage note will enable the transferee to obtain an order of seizure and sale—though the public act of transfer shows no acceptance by the transferee.

Where the vendor has bound himself to raise certain mortgages on the property sold, he will not be entitled to an order of seizure and sale, unless he can show by authentic act that he has done so.

A PPEAL from the District Court, Parish of St. Mary, *Voorhies*, J. ACT OF TRANSFER.

State of Louisiana, Parish of St. Mary.—Before me, *Thomas A. Smith*, a notary public in and for the parish of St. Mary, duly commissioned and sworn, personally appeared *Cyrus B. G. Whelden*, of said parish, who declared that he had transferred, and by these presents does hereby transfer to *Joseph V. Bacon* and *Thomas H. Bacon*, of Boston, Mass., partners in trade, doing business in said Boston under the name of *Joseph V. Bacon & Son*, a certain promissory note for one thousand, five hundred and fifty-one dollars and ninety-one and a half cents, signed by *Thos. Maskell*, dated January 9, 1850, and payable one year after date to the order of said *Whelden*, with eight per cent. interest from maturity, the said note is secured by mortgage act of said *Maskell* to said *Whelden*, passed before *J. A. Dunartrait*, recorder, on the 9th of January, 1850, and is signed "ne varietur" by said recorder, to identify it

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therewith—and the said *Whelden* declared that he does also, by these presents, assign and transfer to said *Joseph V. Bacon* and *Thomas H. Bacon* his rights in and under said mortgage, to secure and enforce the payment of said note, hereby subrogating them to all his rights in said note, and in the mortgage given to secure the same, so far as relates to the said note, the consideration of this transfer is the amount of said note, the same being accounted for to said *Whelden* by said transferees on settlement.

Done, passed and signed at the parish of St. Mary aforesaid, in presence of *William Ager* and *William C. Dwight*, competent witnesses, who have signed these presents with said appearer, and me said notary, after due reading, this tenth day of April, in the year of our lord, one thousand eight hundred and fifty-one.

C. B. G. WHELDEN.

WILLIAM AGER.

WILLIAM C. DWIGHT, Witnesses.

A true copy from the original filed in my office.

THOMAS A. SMITH, Notary Public.

Dwight and *Lea*, for plaintiff. *Maskell*, for defendant and appellant.

Lea, for plaintiff—cited 7 M. R. 239; 1 A. 323; 5 A. 124.

Maskell, for defendant—cited 5 Rob. 85; 1 A. 323; 4 A. 152.

Rost, J. This is an appeal from an order of seizure and sale; the appellant seeks to have it set aside on two grounds.

1st. That the transfer of the note sued upon, from the original payee to the plaintiffs, although made by authentic act, is insufficient; because the plaintiffs were not parties to it, and their acceptance of it is not shown.

2d. That by the act of sale, out of which the note originated, the vendor bound himself to raise certain mortgages existing on the property sold, within a reasonable time; that the note was transferred to the plaintiffs, after its maturity and after a reasonable time had elapsed; and no recovery can be had upon it by them, unless they show that those mortgages have been raised.

We think the transfer and the possession of the notes by the plaintiffs sufficient to authorize the order of seizure—but the other ground appears to us well taken. Near eighteen months had elapsed since the sale when the order issued, and the payment of the note could not have been enforced, even in an ordinary suit, unless the plaintiff had shown that the mortgages, which the vendor had assumed to raise, had been satisfied and erased from the books of the recorder; the same showing is indispensable in this proceeding, and unless it can be made by authentic acts, the plaintiff must resort to an ordinary suit.

It is ordered that the order of seizure and sale appealed from be set aside, and that the costs in both Courts, since the filing of the petition, be paid by the appellee.

PIERRE J. B. FONTENET v. LOUIS DEBAILLON, Adm'r. &c.

Where by the terms of sale of the property of an insolvent succession, fixed by the creditors, the property was to be sold on a credit—the “purchasers giving their obligation, with *two approved securities*, each,” &c.—it was the duty of the Administrator himself to require two good surties, and the responsibility is his, if it was not done.

Where by the terms of such a sale, the price of the property sold was to bear ten per cent interest until paid, the Administrator is chargeable with the interest until the principal is paid; and it is no defence for him that he paid some of the claims against the estate before the expiration of the credit term.

By the Court: It is urged that the plaintiff has lost the benefit of his judicial mortgage by his failure to re-inscribe his judgment within ten years. It is far from clear that this principle is applicable to mortgages which an administrator is bound to raise for the purpose of selling the property and settling the debt of the succession. But even if it is, the plaintiff obtained a judgment that his claim should be paid with the benefit of his judicial mortgage. Besides it was the duty of the administrator to have paid the plaintiff, as a creditor with a judicial mortgage in 1841, and he cannot take advantage of any thing which has occurred from his constant resistance of payment until now, ten years afterwards. We consider, therefore, that the plaintiff has not lost the benefit of his judicial mortgage.

APPEAL from the District Court, Parish of St. Landry, *Overton, J. Latasé,* for plaintiff. *King*, for Administrator. *Linton*, for the Heirs.

PRESTON, J.* A judgment was obtained for the plaintiff, *Fontenet* against *Jean M. Debailon*, for thirteen hundred and seventy-four dollars seventy-three cents, with interest at the rate of ten per cent per annum from the 18th of June, 1837. It was recorded in the mortgage office on the 11th day of June, 1838, for the purpose of creating a judicial mortgage against *Debailon's* property.

Debailon died in the parish of St. Landry on the 30th of October, 1838, leaving property appraised in the inventories at upwards of thirty thousand dollars. His children, however, had a claim against him of about twenty thousand dollars on account of the paraphernal property of their deceased mother. They renounced the succession of their father, and it was administered as an insolvent estate.

A meeting of the creditors having been convened, it was determined and decreed that the property should be sold, “one-half the purchase money to be paid in one year and one-half in two years, with interest from the date of sale, at the rate of ten per cent per annum, the purchasers of real estate and slaves giving their obligations, with *two approved securities*, each, and the property remaining mortgaged to the estate, until final payment, and the purchasers of movables giving approved personal security, these being the terms and conditions decided on by a majority of the creditors of said estate, and by the family council of the minor heirs.”

The sale took place on the 2d of April, 1839, and the following days, and produced with other sales made in 1840, 1843 and 1846, the sum of \$32,658. If interest at ten per cent during the two years of credit is added, according to the conditions of the sale and also some small collections of notes and accounts due the deceased, the mass of the estate would amount to \$38,000, for which the administrator is bound to account.

On the 2d day of April, 1839, the defendant, a son of the deceased, was ap-

* This judgment was pronounced in 1851, and that on the re-hearing in 1852.

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pointed Administrator, and took charge of the estate. In 1848 he presented to the Probate Court a tableau of the debts of the succession, for classification. He did not place upon it the judgment in favor of the plaintiff against the deceased, and the latter filed an opposition to the tableau. It was not tried until in November, 1849, when the District Court, to which the case had been transferred, rendered a judgment that *Pierre J. B. Fontenet* "should be placed on the tableau of classification of the creditors of the estate as a judicial mortgagee creditor for the sum of \$1,374 73, with yearly interest thereon at the rate of ten per cent. per annum from the 18th day of June, 1837, until paid, with privilege upon the proceeds of the immovable property of the estate from the 11th day of June, 1838—the date of registering the judgment; and the administrator was ordered to pay the claim in conformity with the judgment." The administrator failed to do so, and the plaintiff took steps to compel him to render a further, full and final account of his administration.

After much delay he rendered the account on the 30th of January, 1851, but by it showed that he had no funds to pay the plaintiff's judgment, nor assets sufficient to pay the privileges and mortgages anterior to the mortgage of the plaintiff.

The plaintiff filed an opposition to the account on many grounds, which have given rise to our present investigations. It has been seen, however, that the administrator is apparently bound to account for \$38,000. Now, the expenses and debts, including a very large mortgage to the Union Bank of Louisiana, which he has paid, amount, by his account, to but \$13,144. The balance of the estate must first be appropriated to pay the tacit mortgage against the estate in favor of the children of the deceased, as heirs of their mother.

The claims of those heirs amounted to about \$20,000; and even if we should allow two years interest, at five per cent., while the notes given for the proceeds of the sale of the estate were maturing, the aggregate would be but \$22,000. The claim for interest, from the death of their mother until the sale, is untenable, as no doubt during that period they were supported by their father, or out of the estate—most of them being minors.

The \$22,000 and \$13,144 paid by the administrator deducted from \$38,000, the supposed mass of the estate, would still leave \$2,856 to be appropriated to the payment of plaintiff's debt and interest, which is more than sufficient to extinguish both. The case resolves itself, therefore, into the consideration of the excuses offered by the administrator for not having in hand the means of paying the plaintiff, or rather his argument to show that he is not accountable for so large a sum as thirty-eight thousand dollars.

It appears that the administrator did not take the security required by the conditions of the sale from *Gervais Fontenet* and some others, for property of the succession sold to them, and that losses exceeding five thousand dollars have occurred from that cause. The administrator claims exemption from liability for these losses on two grounds: first, that he entrusted the Probate Judge to take the bonds, as was the custom of the times, which was neglected; and next, that the father of *Fontenet*, then solvent, was offered and accepted as his security; that immediately afterwards he became insolvent, and the loss would have occurred even if he had signed the bonds. Neither excuse is tenable. It was the duty of the administrator himself to require *two good securities*, and the responsibility was his if it was not done. And if he had seen that the security was duly taken it would have been an inducement to the Fon-

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tenets, father and son, to have struggled more zealously for the reciprocal benefit of each other, to have avoided the loss. It is evident that the administrator did not subsequently exercise that care and rigor on the subject which became his office. He might have re-sold the property at the risk of *Fontenet*, and thus have prevented the loss. When the first term of payment became due he should have caused the property to have been seized and sold under the special mortgage, and the neglect to do so was utterly inexcusable. He did not do so even when the second term of payment became due, but waited until more than a year afterwards, when the property was sold at twelve months credit for not as many hundreds as thousands were bid at the probate sale.

We are bound to presume that a rigid requisition of the security required by the creditors would have prevented this extraordinary loss; and perhaps even a prompt re-sale of the property for non-compliance with the conditions of the first sale, or the enforcement of payment by the seizure and sale of the property when the first instalment became due, would have prevented the loss.

We are, therefore, bound to conclude that the District Court has justly charged the administrator with the losses which have thus occurred.

He contends next, that the ten per cent. interest should not be added to the amount of the sales of the estate from its date until the terms of payment expired, according to the conditions of the sale, because he alleges, and indeed proves, that he paid some claims against the estate before the expiration of those terms. But this should not deprive the succession of the benefit of that interest, because the creditors and heirs, having fixed the terms and conditions of the sale, were bound to wait for payment until the expiration of the terms. Under the arrangement the interest was as much a part of the price due to the mass of the estate as the principal, and the plaintiff who is the last mortgagee creditor, has a right to insist on the administrator being charged with it. If he has really suffered any loss by anticipating payments, he has still on hand upwards of two hundred shares of the capital stock of the Union Bank, with which to indemnify himself; and it may be remarked that the principal interest stopped by anticipated payments was that accruing to the Union Bank, and moreover that the stock should have been sold and the proceeds applied to the debt of the Bank, thus leaving a larger surplus of the proceeds of the property mortgaged to the Bank for the subsequent mortgage.

It is possible a small amount should be deducted from \$38,000 for interest on account of the funeral expenses and law charges paid by the administrator before the proceeds of the sales were realized. The sum would be too inconsiderable to change the result, especially as there are other claims which the administrator did not pay until long after those proceeds were realized.

It is said the Court committed a great error in charging the administrator with interest from the day of sale on a sum of upwards of six thousand dollars given for cattle, which were deliverable only in the summer after the sale, and the interest to commence on the price after the delivery. The sale took place in April, 1839. The cattle were deliverable during the summer following, and on the supposition that the terms of payment were to commence from the day of sale, and not of the delivery, interest should not have been charged for the few intervening months between the sale and delivery; but this again would make no difference in the result as to the plaintiff, a sufficiency remaining to pay his claim after making a reasonable deduction from the \$38,000 on account of this interest.

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It is urged that the plaintiff has lost the benefit of his judicial mortgage by his failure to re-inscribe his judgment within ten years. It is far from being clear that this principle is applicable to mortgages which an administrator is bound to raise for the purpose of selling the property and settling the debts of a succession. But even if it is, the plaintiff obtained a judgment that his claim should be paid with the benefit of his judicial mortgage. It was not appealed from by the administrator or any creditor, and remains in full force. Besides, it was the duty of the administrator to have paid the plaintiff as a creditor with a judicial mortgage in 1841, or certainly with the proceeds of the sales of 1846, and he cannot take advantage of any thing which has occurred from his constant resistance of payment until now—ten years afterwards.

We consider, therefore, that the plaintiff has not lost the benefit of his judicial mortgage, and is entitled to be paid next to the privileges and anterior mortgages out of all the proceeds of the real property. There were no mortgages anterior to his but those of the heirs of *Mrs. Debaillon* and the Union Bank. Their claims, with all the privileges, added to the claim of the plaintiff, do not exceed the \$38,000, for which the administrator ought clearly to have accounted on the 13th of June, 1846, and paid over to plaintiff his claim. Even if by our errors in calculation there may have been a balance against the estate instead of being in its favor, we are sure the administrator may fully indemnify himself by the sale of the Union Bank stock still in his hands.

An appeal has been taken by the heirs of *Mrs. Debaillon*. The evidence does not satisfy us that their claim against their father's succession exceeded \$20,000; and on this supposition the administrator must, for the reasons given, account for a sum sufficient to pay them without curtailing the claim of the plaintiff.

The judgment of the District Court is therefore affirmed, with costs.

A re-hearing was applied for and granted.

By the COURT:—This cause being considered on a re-hearing, it is ordered that the judgment heretofore rendered by this Court be re-affirmed.

ROBERT PATTERSON & Co. v. M. A. FRAZER & WIFE.

A married woman cannot, by surrendering to her husband the partial or entire administration of her paraphernal property, exonerate herself from liability for debts incurred for her individual use, or for the purpose of rendering that property productive.

A minor, who is a married woman is not incapacitated by article 874 of the Code from incurring debt beyond the amount of one year's revenue, for her individual use, or for the benefit of her paraphernal property.

APPEAL from the District Court, Parish of St Mary, *Voorhies*, J. T. H. *Lewis*, for plaintiffs. *Gibbon*, for defendants and appellants.

OPINION AND DECREE OF THE DISTRICT COURT.

The defendant, *Nancy Frazer*, is sued by the plaintiffs for the recovery of advances which they have made to her for the purchase of building materials, and for provisions and supplies for the use of her plantation.

The evidence satisfactorily establishes all the items of the amount sued upon, except \$10 charged as commission for the endorsement of *Hollander's* note,

\$1 54 for postage, and \$2000 charged as cash advanced. This charge is evidenced by the receipt of *M. A. Fraser*, the husband. It is not shown that it has inured to the benefit of the defendant.

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The plea of minority cannot avail the defendant for the advance of money to purchase building materials employed and used on her plantation, and for supplies and provisions furnished the same.

The plea of prescription may apply to the privilege claimed, but cannot affect the plaintiffs' rights of action to recover the amount due them, independent of the exercise of such privilege.

It is therefore ordered, adjudged and decreed, that the plaintiffs recover of the defendant the sum of seven thousand two hundred and ninety-nine dollars and thirty-one cents, with legal interest from judicial demand, and the cost of this suit to be taxed.

By THE COURT*—(SLIDELL, J., dissenting.) Judgment affirmed for the reasons given by the District Court.

SLIDELL, J., dissenting. My opinion is that the wife ought not, under the circumstances, to be held bound at all, even to the extent to which her paraphernal estate has been improved with the money of the defendants, in erecting the sugar house and permanent improvements. My reason is, that in all the business out of which the claim sued for arises, the plaintiffs, as I understand the evidence, dealt with Messrs. *Hollander & Fraser* so long as *Hollander & Fraser* continued in partnership, and after *Hollander* withdrew, with Mr. *Fraser* and *Hollander* as his agent. The correspondence, purchases, shipments, &c., are with, for and to those parties. Mrs. *Fraser's* name does not appear, and the management of the estate and crops appears to have been entirely in the hands of the partnership, and afterwards of the husband. The credit appears to me to have been given to them, and the contracts were made with them.

A re-hearing having been granted, the judgment of the Court was pronounced by

DUNBAR, J. This cause comes before us on a re-hearing. After the most mature reflection, we are not able to see that we should change the opinion heretofore given as to the law of this case.

In *Dickerman et al. v. Reagan*, 2d Ann. 440, this Court decided that "the separate property of a married woman is liable for debts contracted during marriage for her individual use, or for the improvement of her separate property, or for marriage charges, which she is bound by law to bear, though the debt was created while her paraphernal property was under the administration of her husband, and during the existence of the community of acquets and gains." A married woman cannot, by surrendering to her husband the partial or entire administration of her paraphernal property, exonerate herself from liability for debts incurred for her individual use, or for the purpose of rendering that property productive. In *Dailey et al. v. Pierson & Wife*, 5 Ann. 125, this Court held the same doctrine. We still adhere to these opinions.

But it is contended that the defendant, being a minor, could not bind herself legally by promise or obligation for any sum exceeding the amount of one year of her revenue. Civil Code, Art. 374. We do not think that this article applies to the species of indebtedness under consideration. The defendant, who is emancipated by marriage, has under the provisions of the preceding article, 373, the full administration of her paraphernal estate, and may pass all acts

* This Judgment seems to have been delivered in 1850—by what Judge it does not appear. Present: BURKE, C. J.; ROSE, SLIDELL & PRESTON, Associate Justices. The judgment on the re-hearing was pronounced in 1852.

PATTERSON & Co. which are confined to such administration. However, the defendant has not made this objection in her answers. We think, at any rate, it should have been specially pleaded.

We have found, on the further examination of this case, an error, which should be corrected. We perceive that the defendant proved that the plaintiff sold of her crop of sugar, sixty hogsheads, amounting to the sum of \$2,978 98, only \$2,000 of which has been accounted for by plaintiffs, which was advanced by them to the defendant's husband previous to their shipment. This will leave \$978 98 for which the defendant should have credit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and proceeding to give such judgment as should have been given in that Court—it is further ordered, adjudged and decreed, that the plaintiffs have judgment against the defendant for the sum of six thousand three hundred and twenty dollars and thirty-three cents, with legal interest from judicial demand, and that the costs of appeal be paid by plaintiffs.

SLIDELL, J., dissenting. The impressions I heretofore expressed, upon the question of the wife's liability, under the peculiar circumstances of this case, have not been removed by further investigation.

STATE v. ALEXANDER VIAUX.

Defendant's counsel having objected to an affidavit made by the deceased for the arrest of the prisoner, as evidence of a dying declaration—parole proof was offered and admitted, that when the deceased made his declarations to the magistrate, he considered himself in a dying state—to which evidence a bill of exceptions was taken. *By the Court*: After the defendant had himself objected to these declarations, reduced to writing in the form of an affidavit for his arrest—he could not with any propriety turn round and object to evidence being given by parole of what the deceased did declare before the magistrate.

When the accused declares himself ready for trial and accepts the jurors, he cannot afterwards object that the list of jurors, with which he was served, contained the names of persons who were exempt and of persons who had served on the Grand Jury, by which the indictment was found.

So it is too late, under the same state of facts, to object that the accused was not served with a list of the names of jurors summoned by special venire.

The District Courts have authority, under the Act of 1817, to appoint an attorney to prosecute on behalf of the State in the absence of the District Attorney.

A PPEAL from the District Court, Parish of St. Martin, *Voorhies, J. Hardy*, District Attorney, 15th District, for the State. *Voorhies & Simon*, for defendant.

MOTION FOR A NEW TRIAL.

The defendant in the above entitled cause, by his undersigned counsel, begs leave to move this honorable Court for a new trial, on that part of the verdict of the jury, by which he has been found guilty of manslaughter, under the second count of the indictment, for the following reasons, to wit:

1st. Because said defendant has been served with a copy of the whole panel of the jury, including therein a list of the jurors, who, having served on the grand jury, by whom the bill of indictment was found against him in this case, were legally and necessarily exempted from serving as petit jurors on the trial of this cause, and also including therein the names of certain jurors who were exempted by law and by the Court from serving on the trial of said cause.

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2d. Because after the regular pannel was exhausted, the Court having ordered two subsequent and new lists of jurors to be made, and the lists so made having been returned by the Sheriff successively during the trial, the defendant was not served with copies of the said new lists or venire, but was immediately called upon to make his challenges, as the jurors were called to the book to be sworn; without his having had any opportunity of consulting or reflecting upon the jurors by whom he was to be tried, or of ascertaining the objections he had to base his challenges upon. All which legal advantages he was deprived of, contrary to law; and all which he did not waive, and could not be waived.

3d. Because the verdict of the jury on the second count of the indictment, is contrary to law and evidence.

Wherefore, the defendant prays that it may please this honorable Court to grant him a new trial on the said second count of the indictment only; the verdict of the jury on the first being definitive. And he prays for all such other and further relief as equity and justice may demand.

Voorhies, J. This is a motion for a new trial, founded on the reasons alleged by the defendant.

The first objection urged by him is, that the list of jurors served upon him, under the provisions of the Act of 1809, improperly included the names of the jurors who served on the grand jury by whom the bill of indictment was found, and of jurors who were exempted by law and by the Court. The Act of 1809 provides, that a prisoner "shall have a copy of the indictment and a list of the jury which are to pass on his trial, delivered unto him at least two entire days before he shall be tried." B. & C. p. 248, sec. 39. In support of his position he relies on the case of the *State v. Hassell*, 3 An. 90, where it was held, that "a list containing other names than those of the jurors who are really to be presented on the trial, necessarily tended to embarrass the accused in his searches for information, and to confuse him in preparing his challenges, and thus defeated the ends of the law. That such a list was not a compliance with either the letter or the spirit of the statute, though it might at the same time contain the names of all the jurors who were to pass on the prisoner's trial." It was objected on the part of the prosecution, that if such a construction were given to the statute, a prisoner whose trial was assigned for the commencement of a term, before it could possibly be known how many of the pannel would be in attendance, would decline going to trial if the whole number of jurors contained in the list delivered to him were not in attendance. In answer to this objection, the Court remarked—that a just interpretation of the statute did not lead to such a consequence. That the inconvenience to which the prisoner might be subjected in the event of the failure of jurors to attend, from unforeseen causes, was one to which he was necessarily to submit, while deriving the benefits of the Statute. It was one of those unavoidable evils which no legislative foresight could provide against, but could never be serious, the number of jurors selected at each drawing being limited. The object of the law would be fulfilled if the prisoner were furnished with a list which was correct at the time of its delivery." The facts on which that decision was given are stated in the opinion of the Court. After his arraignment, the defendant was served with a list of 108 names, headed "list of jurors drawn to serve during the term of June, 1847," and with a further list of 48 names, headed "List of additional jurors drawn to serve during the term of June, 1847." These lists comprised the names of all those who were originally drawn to serve as jurors for the term, and of two additional drawings ordered by the Judge, in consequence of the large number who, from various causes, were not in attendance on the Court. On the day of trial, a third list was delivered to the prisoner of thirty-six jurors, whom, he was informed, were to be presented to him, and from whom alone the jury was to be selected. These thirty-six jurors were included in the two lists previously served on the prisoner, and of the several drawings were the only jurors present. The counsel objected to going to trial, &c. Under such circumstances, it is obvious that the objection was well taken, otherwise the defendant would have been deprived of the benefits secured to him under the Act of 1809. The provisions of the Act of 1821, under which the drawings of the jurors in that case were made, were only applicable to the first judicial district. The jurors in this case, comprising forty-

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eight names to serve as grand and petit jurors, were drawn under the provisions of the Act of 1846, p. 69, nineteen of whom were set apart to serve as grand jurors. A copy of all their names was served on the defendant two entire days before his trial. The names of all the jurors, written on ballots, including those set apart as grand jurors, were put into the box, and drawn separately, and when called to the book to be sworn, no objection was made by the defendant, on the ground of the illegality of the list thus served upon him.

The regular pannel being exhausted, the Court granted an order of *tales de circumstantibus*, and the number necessary to complete the jury was selected without objection as to the service of the list of the same on the defendant.

There is no doubt but that the defendant was entitled, under the principles laid down in that decision, to a list containing only the names of those of the jurors who were to be presented on the trial. Without deciding on the informality of the list of jurors served on the defendant, arising from the circumstance of including the names of the grand jurors therein—in other words, a copy of the *venire*, it may be inquired whether the objection does not come too late, after having accepted the jurors. In the case of the *State v. Hernandez*, 4 An, 379, King, J., in delivering the opinion of the Court, said: "When the accused was brought to the bar, he declared himself ready for trial, and accepted the jurors who were to pass upon the charges preferred against him. This is a waiver of the indictment, if indeed one had not been previously served upon him." As to this pre-requisite, the statute is as imperative as it is in relation to the service of the copy of the list of jurors who are to be presented on the trial. In the case of *Howell*, the principle settled was, that the right to claim a copy of the indictment was not forfeited after pleading. But when the accused declares himself ready for trial, and accepts the jurors, does not the objection come too late? I think so. Under the ruling in the case of *Hernandez*, it must be considered a waiver of his right.

2d. The second ground of objection must also be viewed in the same light.

3d. In regard to the third, I am not prepared to say that the verdict of the jury is against law and evidence.

It is, therefore, ordered that the motion for a new trial be overruled.

MOTION IN ARREST OF JUDGMENT.

The defendant in the above entitled cause, by his undersigned counsel, begs leave to move in arrest of the judgment to be rendered by this honorable Court on the verdict returned by the jury, on the following grounds, to wit:

1st. Because having served with a copy of the original *venire* and of the whole pannel of the jury, in which were included the names of all the jurors who had served upon the grand jury, and also the names of certain jurors who were exempted by law from serving on the jury, said defendant, having prepared his challenges on said list, without being aware of the fact that all said persons, therein named as jurors, were exempted from serving on his trial, has been deprived of the right of exercising his challenges properly, and therefore, has not enjoyed the benefit of a fair and impartial trial as contemplated by law.

2d. Because this honorable Court having ordered two successive *venires* to issue, after the original *venire* had been exhausted, two lists of jurors were returned by the Sheriff instanter and successively. Whereupon the defendant was called on to make his challenges, without being served with any copy of the said lists, as the law directs; by reason of all which he has been embarrassed in making his challenges, and unable to exercise fairly his right of challenging, as contemplated by law.

3d. Because the bill of indictment found by the grand jury in this case, is signed "*Fred. Gates*, District Att'y, pro tem, for the Fourteenth Judicial District of the State of Louisiana;" which office, to wit: that of District Attorney, pro tem, for the Fourteenth Judicial District of the State of Louisiana, is unknown to the constitution and laws of said State, and is not in any manner therein provided for.

4th. Because the person who signed the said bill of indictment, and who submitted to the grand jury, as District Attorney *pro tem*, had no authority to sign the same under the constitution and laws of this State, or to submit the same under the constitution and laws of this State, or to submit the same to the grand jury.

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5th. Because the person who signed the said indictment, as District Attorney *pro tem*, had been appointed by the Court to act as such in this case; and although said appointment was made by the Court, after it had been shown that the District Attorney now in office and lately appointed by the Governor of the State as District Attorney for the Fourteenth Judicial District of the State of Louisiana, in the place of *Alex're R. Splane*, deceased, could not act as such in this cause, because he had been long previous to his appointment, consulted, retained and employed by the defendant as one of his counsel, (all which facts are hereby admitted,) still the defendant contends that this honorable Court has not, under the constitution and laws of the State of Louisiana, any authority to make any such appointment, either *pro tem* or otherwise.

6th. Because there cannot be but one District Attorney for each Judicial District of this State, under the constitution and laws of said State, to be appointed by the Governor, with the advice and consent of the Senate. Wherefore, the defendant prays that this, his motion in arrest of judgment, be allowed to prevail; that the indictment found in this case be quashed and rejected, and that he be discharged from the same in due course of law. And he prays for all such other and further relief as equity and justice may demand.

Voorhies, J. This is a motion in arrest of judgment, based on various grounds which are specified by the defendant.

The first error apparent on the face of the record, of which he complains, is, that the bill of indictment found by the grand jury is signed by *Fred. Gates*, as District Attorney, *pro tem*, for the Fourteenth Judicial District of the State of Louisiana, which is an office unknown to the constitution and laws of the State.

The next ground of objection is a consequence of this: that the person who signed the bill of indictment had no authority to do so, or to submit the same to the grand jury. In order to test the validity of these objections, it is necessary to ascertain in the first place whether the Court was invested with legal authority, under the circumstances of this case, to make the appointment of an attorney to prosecute on behalf of the State *pro tempore*; and if so, whether the indictment thus signed and submitted to the grand jury vitiated the proceedings.

The appointment was made under the Act of 1817, which provides, that "whenever, in any of the Courts of this State, the attorney general, or the prosecuting attorney of the district, shall not attend, the judge shall have power to appoint an attorney to prosecute on behalf of the State, *pro tempore*." This law must be considered as still in force, unless repugnant to the constitution, which provides that "all laws in force at the time of the adoption of the constitution, and not inconsistent therewith, shall continue as if the same had not been adopted."

In relation to the appointment of District Attorneys, the constitution of 1812, contained substantially the same provision as the new constitution; the only difference between the two is, that the latter has limited the duration of the office to two years. Con. 1812, art. 4, sec. 7. Constitution, articles 74, 90. Under both constitutions the number of District Attorneys was fixed by the Legislature and the appointments made by the Governor. Acts of 1818, p. 299 and Acts of 1846, p. 61. The Act of 1846 also makes it the duty of the District Attorneys to attend the sessions of the Courts in each of the parishes in the Judicial District and to represent the State in all civil and criminal cases." The Act of 1818 also required them to discharge their duties in person, unless prevented by sickness or physical impossibility." The Legislature doubtless foreseeing the inconvenience or injury which might result to the public interest in consequence of such absence, enacted the law of 1817. Since the adoption of the new constitution no such provision has been enacted by the Legislature, consequently the Act of 1817 must be considered as still in force.

And here it may be premised, in answer to the objection urged as to the power of the Court to make appointments to office, that the mere designation or appointment of an attorney to prosecute on behalf of the State *pro tempore*, in certain specified cases, cannot be fairly construed as an appointment to a public office.

It is an appointment not to an office but for the performance of a specific duty, which is incumbent on the District Attorney, who is prevented or ex-

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cused from performing the same. The question then arises, had the Court the power, under the Act of 1817, to appoint an attorney to prosecute in this case? In the practice in criminal cases in this district after the enactment of that law, the power was never doubted. I am, therefore, of opinion that the law of 1817 embraces this case.

It is, therefore ordered, adjudged and decreed, that the motion in arrest of judgment be overruled.

Edouard Simon, for appellant:

The defendant was convicted of manslaughter and sentenced to two years imprisonment at hard labor in the Penitentiary.

The District Attorney of the Fourteenth District, having been employed by the defendant, previous to his appointment as District Attorney, considered himself as incapacitated from prosecuting this case; whereupon *F. L. Gates* was specially appointed by the Court to fulfil the duties of District Attorney in this prosecution. The bill of indictment is signed: "*F'r'c Gates*, Dist. Att'y pro tem. for the Fourteenth Judicial District of the State of Louisiana."

On the trial of this cause, the counsel, representing the State, attempted to introduce in evidence on behalf of the prosecution, a certain document purporting to be an affidavit of the deceased, taken before a magistrate, commencing by the words: "Before me, *Edmond Monge*, justice of the peace in and for the parish of St. Martin, the information of *Vital Brousson*, of the parish aforesaid, who on his oath complains, &c." Then giving a statement of the facts as related by the affiant to the magistrate, and ending by the words: "All this against the peace and dignity of the State aforesaid and contrary to the form of the statute in such case made and provided. Wherefore the said complainant prays that the said *Alexander Viaux* may be apprehended and held to answer this complaint, and further dealt with according to law." This document was rejected by the Court *d quo*, on the objections made to its admissibility by defendant's counsel.

But after it had been rejected, the prosecuting counsel produced a witness to prove the contents of the document, the declaration having been made in his presence, and to prove that the same, having been made when the deceased was in such a state as to be aware that he was going to die, was said deceased's dying declaration. The testimony was objected to on divers grounds stated in the bill of exceptions, but the judge *d quo*, after hearing the witness as stated at the close of said bill of exceptions, overruled the defendant's objections, and permitted the testimony to go to the jury.

After the verdict, a motion for a new trial was made by defendant's counsel, upon divers grounds, which motion was overruled by the Court.

Before the sentence was pronounced, a motion in arrest of judgment was made on behalf of the defendant on several grounds, which motion was also overruled.

This case then will present three distinct points, to wit:

1st. That resulting from the bill of exceptions taken to the opinion of the Court *d quo*, permitting the contents of deceased's affidavit to be proven by a witness, and to go to the jury, after the document itself had been rejected.

2d. The questions of law growing out of the motion for a new trial, that is to say, out of the two first grounds.

And 3d. The questions presented by the motion in arrest of judgment.

I. The judge *d quo* allowed the State to prove by parol the contents of a written affidavit which had been rejected, because the witness proposed to be examined first said: "that he was present when deceased gave his declaration to the magistrate, saw the wounds of deceased, and from them he judged he had very little time to live; deceased said before and after giving his declaration, that he would die; and the appearance of deceased indicated that he was conscious of his approaching dissolution." The evidence was objected to on the grounds: that the declaration from the affidavit already rejected, was not a dying one, and had not been made in contemplation of death; that the deceased did not make his said declaration to the magistrate with a view of making a dying declaration, but on the contrary, as shown by the document rejected, to cause a warrant to issue to arrest the defendant; that dying declarations, in order to serve as evidence, must be shown to have been made in those cases alone where the death of the party was the subject of inquiry, and not when the object of

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the declaration is to have the accused arrested, as shown by the affidavit already produced and rejected; and that the original written declaration having been rejected, the State had no right to prove its contents by witnesses, said parol proof being secondary evidence only, left entirely to the memory of man, &c.

It is clear the affidavit of the deceased was taken for the only purpose of receiving his complaint and of arresting the defendant, who, at the request of the deceased, was to be dealt with according to law. It was a complaint made before a magistrate, assisted by his constable, (the latter is the witness whose testimony was admitted,) and under such circumstances, could it be expected that the deceased would have stated any other facts but those upon which his complaint was to be based? The affidavit was not made in contemplation of death, and it is reasonable not only to presume, but to conclude that the deceased, in lodging his complaint, must have been influenced and actuated at the time by animosity and resentment against the accused, whose punishment he was seeking by causing him first to be arrested and held to answer his complaint. *Roscoe*, on the subject of *Dying Declarations*, page 33, says: "Such evidence, (speaking of dying declarations) therefore, is liable to be very incomplete. He (the deceased) may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The power of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost." Such was undoubtedly the situation of the deceased, and the affidavit taken from him, without any other inquiry but what he pleased to state as the basis of his complaint, and without any cross-examination, shows on its face that he had no other object in view but to apply to the laws of the country for the revengeful punishment of his antagonist.

I am well aware that the dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are generally admitted in criminal prosecutions, but the death must be the subject of the criminal inquiry. *Wharton*, Am. Crim. Law, p. 179. Here, was the death of the complainant the subject of the inquiry? Surely not. The subject, or rather the object of the inquiry was the prosecution of the accused and the means of bringing him to his punishment. *Wharton*, page 181, says: "The declarations are only admissible where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration. Thus, in a case where the prisoner was indicted for administering poison to a woman pregnant, but not quick with a child, with intent to procure abortion; the woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge who tried the case, rejected the evidence, observing that, although the declaration might relate to the causes of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry." Here again, the circumstances of the death were not the subject of the declaration; the affidavit was merely made to procure the arrest of the defendant; for that purpose, the deceased may have related the causes of his expected death, so far as it was necessary to do in making his complaint, but surely there is nothing in the declaration, or in the manner in which it was made and received, showing that the death of the affiant was the subject of the criminal inquiry.

One of my objections to the admissibility of the evidence is: that the State had no right to prove by parol the contents of a written declaration which had already been rejected by the Court. *Roscoe*, p. 33, says, on the authority of the cases therein cited: "Where a dying declaration has been reduced to writing and signed by the deceased, neither a copy of the paper nor parol evidence of the contents can be received." The rule is a safe one in favor of the accused, as it would be too dangerous to receive parol evidence of statements made by one person to another who reduced them to writing, inasmuch as the facts disclosed by the secondary evidence, might be inaccurately stated, or may have produced on the mind of the witness an impression entirely different from that which it should have really received. It is true that, in that case, the affidavit of the deceased had been rejected; but it was not the defendant's fault if the State could not use it; it was very properly rejected by the Court, when offered by the State as a dying declaration; it was not intended originally as

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such—it was not taken for that purpose, and it must seem strange that the contents thereof were allowed to be proven by parol, after the document itself had been declared to be illegal testimony. See also Wharton, page 182.

But it will be urged that the parol evidence of the contents of the affidavit, having been preceded by the proof that the deceased was aware of his approaching death, this was sufficient to make the evidence legal; and this seems to be the foundation of the opinion of the Judge *a quo*, when he admitted the testimony. This preliminary testimony was also objected to; but what does it prove? The witness was present when the deceased gave his declaration to the magistrate; he saw the wounds of deceased, and judged that he had very little time to live. This, then, was simply the opinion of the witness, formed from his examination of the wounds; but he adds that the deceased said before and after giving his declaration, that he would die, and that the appearance of deceased indicated that he was conscious of his approaching dissolution. In what that appearance consisted, the witness does not say, and it must again be merely the opinion of the witness, from the appearance of the deceased only, and from what he may have said at the time. Is this sufficient to show that he was really conscious of his approaching death? Was he fully aware of his situation? He said he would die, but people who say that very often recover. Wharton, *loco citato*, says: "The dying party, to make the declaration evidence, must, at the time of making it, have an idea of a future state." Now, did the deceased in this case, express any such idea? In Roscoe, page 30, it will be seen that it was held that, "for the purpose of determining whether the declarations ought to be received, the conduct of the deceased should be considered, to see if it was that of a person convinced that 'death was at hand,' and not merely the expressions he used respecting his condition." Here, far from having an idea of a future state, and far from abandoning all ideas of this world, the deceased, though he may have said he would die, was actuated, in making his affidavit, by motives of revenge; his object was the prosecution of the defendant, whom he accused of having shot him; and surely no one can conclude from his conduct, not even from his saying that he would die, that his mind was so penetrated with the idea of a future state that he was conscious of his being in such a situation as to appear soon before his God! A man impressed with this idea would have acted differently.

II. A new trial was moved for on two principal grounds: 1st, Because the defendant was served with a copy of the whole original panel of the Jury, including therein a list of Jurors who, having served on the *Grand Jury*, by whom the bill of indictment was found, could not serve as *Petit Jurors* on the trial of this cause; and also including therein the names of certain Jurors who were exempted by law and by the Court from serving on the Jury at all during the term. And, 2d, Because the regular panel of the Jury, having been exhausted, the Court ordered two new lists of Jurors to be drawn successively; and said lists having been returned by the Sheriff successively during the trial, the defendant was ruled into the trial of his cause, without having been served with copies of said new lists as the law directs, and was therefore unable to prepare his challenges; and the two grounds may be taken together.

1st and 2d. The original panel of the Jury was composed of 48 names, a copy of which was served upon the defendant. Among those 48 names, nineteen had been drawn to constitute the *Grand Jury*, and two of them, to wit: *Gustave Fournet* and *John G. Harry*, were by law exempted from serving on the Jury. It is also admitted that two lists of *talismen* were successively and immediately drawn in open Court during the trial; that the Sheriff made his returns immediately, and that the Jurors were also immediately called to serve on the trial, without any of the said lists having been served on defendant. It resulted, therefore, that in the list of 48 names served upon defendant, as being the list of the Jury that were to pass on his trial, there were 21 names of Jurors who could not be presented to the prisoner; and I contend that that is not only irregular and illegal, but that it vitiates the proceedings in such a way as to cause the verdict to be annulled. The same consequence must result from the want of service of the new lists.

The law of 1805 (Bull. & Cur., p. 248 No. 35) provides that "the accused shall have a copy of the indictment and a list of the Jury which are to pass on his trial, delivered unto him at least two days before he shall be tried." This provision of the law is general in its terms, and the list must contain the names of the

Jurors by whom he is to be tried. This is a right which belongs to the accused, which he cannot be deprived of, and the right is a very important one, in as much as it gives him a fair opportunity of consulting or reflecting upon the Jurors who are to decide upon his fate, and of ascertaining the objections he may have to base his challenges upon. From the list served upon the prisoner in this case, how could he know that nearly one-half of the names could not pass on his trial? How could he ascertain the names of those who were not to pass on his trial? And how could he object to the list when he had every reason to believe that among the 48 names, the Jury that was to try him was to be selected? He had prepared his challenges accordingly; but the *names of the Grand Jurors*, of course, *were not called*, and the accused must necessarily be thrown into great confusion and even disappointment, when he sees that Jurors, by whom he may have wished to be tried, are not called to the book, and that they are to be replaced by others called *instantly*, and taken among the bystanders. This branch of the question the Judge *a quo* has not touched in his written opinion; it did not strike him that the prisoner, relying upon the correctness of the list served upon him, had no objection to make, could not be prepared to make any, as he could not know beforehand that one-half of the names given to him would not be called and presented to him. The case of the *State v. Howell*, 3 Ann., 50, is directly applicable to the question; the court says: "The object of the law in directing a list of the Jurors to be furnished to the accused is, to enable him to inquire into the characters of the judges by whom he is to be tried, and to prepare his challenges. The short time allowed him for making this preparation is provided with reference to the limited number of the Jury." And further: "A list containing other names than those of the Jurors who are really to be presented on the trial, necessarily tends to embarrass the accused in his searches for information, and to confuse him in preparing his challenges, and thus defeats the ends of the law; such a list is not a compliance with either the letter or the spirit of the Statute, although it may, at the same time contain the names of all the Jurors who are to pass on the prisoner's trial." This question, it seems to me, is very clear; but the lower Judge, in recognizing that such was the right of the prisoner, and that he was entitled to be served with a correct list of the Jury that was to *pass upon his trial*, overruled his motion for a new trial, because he thought the right had been waived by not objecting, and by having, as he says, accepted the Jurors who were presented.

The decision of the Judge *a quo* on this last question, carries too far the doctrine of waiver: it is based upon the case of the *State v. Hernandez*, 4 Ann., 379, in which this Court decided that when a copy of the indictment has not been served on the accused, his being brought to the bar, his declaring himself ready for trial, and his accepting the Jurors who are to pass upon his trial, will be considered as a waiver of the right. But here there is, and there cannot be any such waiver; the appellant does not complain that he was not served with a copy of the indictment, but says that the list of Jurors served upon him, was incorrect; that one-half of those Jurors could not pass upon his trial; that he could not know the fact of incorrectness when he was brought to the bar; that he thought the list was correct and had prepared his challenges accordingly; that when the Jury was formed he was induced to believe that the persons whose names were in the list without their being called, were absent; that he only ascertained the fact and the cause of their not being called, after it was too late; that he was deprived of his rights without knowing at the time of the trial that the list was incorrect; that he could not then make the objection; that the new lists of Jurors were made during the trial, without his having been served with copies thereof; and the Jurors were called to serve *instantly*; and that he cannot be considered as having waived a right which he had at the time no reason to believe had not been extended to him, as he was not then aware that nearly one-half of the Jurors named in the list were incompetent to pass on his trial, nor could he know the fact when the names of the Jurors who were to try his case, were called. On comparing the list of *Grand Jurors* with the names of the *Petit Jurors*, who tried this cause, the Court will see that none of the *Grand Jurors* were sworn to try this case; and why? Because they were not called to the book, being then yet on the *Grand Jury*; they were not called, for the officers of the Court knew that they could not serve on the *Petit Jury*; and yet, *their names were on the list served upon the accused, as*

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Jurors who were to pass upon his trial. In the case of *Howell*, 8 Ann., 50, it was held that a prisoner does not waive his right, under Sec. 35 of it: 4 May, 1805, to have delivered to him a list of Jurors two days before his trial, by pleading without claiming it. The case of *Howell* is in all respects applicable to the present one, and not the case of *Hernandez*, where the question tried and decided was with regard only to the want of service of a copy of the indictment. Here, again, the list of Jurors was served, but it was incorrect, and the incorrectness was such as the accused could not discover at the time of the trial. The absolute want of service of the other lists, is also a fatal defect in the proceedings of this case; the accused was deprived of this important right, and his pleading and going to trial without claiming it, is not a waiver of it.

III. On the motion in arrest of judgment: This motion is based on the same grounds at those already disposed of; and upon four other grounds relating to the appointment by the Court of a counsel to represent the State in lieu of the District Attorney, and to the manner in which said counsel signed the bill of indictment, to wit: as *District Attorney pro tem. for the fourteenth Judicial District of the State of Louisiana.*

The questions arising from the appointment of a counsel to represent the State, have been fully argued by my associate counsel in his brief, and I shall not add anything in that respect to his argument. But I contend that the counsel who was acting in this case, by special appointment from the Court, had no right or authority to sign the bill of indictment as *District Attorney pro tem. for the fourteenth Judicial District of the State of Louisiana*, and that his signature as such is a fatal defect, which, of itself, is sufficient to quash the indictment. It is a well-known rule in criminal law, that the indictment must be signed by the prosecuting attorney, and that he must endorse the capacity in which he signed the bill which he presents to the Grand Jury. Here, the prosecuting Attorney calls himself, or rather styles himself, as occupying an office unknown to the Constitution and laws of the State; there is no such office as *District Attorney pro tem.* for any of the Judicial Districts of the State of Louisiana; and although he was acting as *District Attorney* under the special appointment of the Court, his signature at the foot of the bill in any other capacity, cannot have any more effect than if the bill had been signed by any stranger assuming the quality of *District Attorney pro tem.* This objection, if available, will have the effect of quashing the indictment, and thus will put an end to the case.

Before closing, I shall call the attention of the Court to the rule established by recent decisions, to wit: that when a prisoner has been indicted for *murder*, and the Jury found him guilty of *manslaughter*, upon a new trial granted, he cannot be tried again for the crime of murder. 5 Ann., 398 and 489. So, if a new trial is granted in this case, the appellant shall only be tried for manslaughter.

Hardy & Gates, for the State.

When a document purporting to be a dying declaration, has been rejected, as being an affidavit, parol testimony to establish what were the dying declarations of the deceased, is not a violation of the rule of evidence prohibiting parol testimony to establish the contents of a written document.

"The dying declaration of a person who *expects to die*, respecting the circumstances under which he received a mortal injury, are *constantly* admitted in criminal prosecutions, when the death is the subject of inquiry." (Wharton, p. 179. 2 Starkie's Evid., p. 261.)

"It is *essential* to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were *made under a sense of impending death.*" (Greenleaf's Evid., vol. 1st, p. 158. 2 Starkie's Evid., pp. 261 and 262.)

It is contended, that there was no error on the part of the Judge below, in admitting the testimony of *G. Bienvenu* to prove what the dying declarations of the deceased were. That the testimony established: That there *was* that sense of "impending death" necessary to make the declarations of the deceased admissible.

It is contended that the "motion for new trial" was not improperly overruled by the Court below. That the objections of the defendant came too late after verdict, and are not good grounds for a motion for new trial. (Vide Acts of 1846, p. 65. *State v. Hernandez*, 4 La. R. 379.)

It is contended, that the "motion in arrest of judgment" was not improperly overruled. That under the Act of 1817 the Court had the power to appoint a

District Attorney *pro tempore*. That when the regularly appointed District Attorney recused himself, he was, as to the case at bar, by law presumed absent. That the Act of 1817, being in force under the Constitution of 1812, and the Constitution of 1845 not clashing with that of 1812, containing no clause relative to the appointment of District Attorney contrary to or repealing that of 1812—the law of 1817 was in force under the Constitution of 1845. That the District Attorney *pro tempore* was the proper officer to draw up, sign and present the bill of indictment to the Grand Jury.

DUNBAR, J. The defendant was indicted for the murder of *Vestal Broussen*, found guilty by the Jury of manslaughter, and has been condemned by the District Judge to be imprisoned in the Penitentiary or State Prison at hard labor for the term of two years. On the trial, the District Attorney offered in evidence as a dying declaration, an affidavit of the deceased, in writing, made and signed by him before a magistrate, for the arrest of the defendant. The counsel for the defence objected to the affidavit as inadmissible, and it was rejected by the Court. Afterwards the State offered the testimony of *G. Bienvenu*, who proved "that he was present when deceased gave his declaration to the magistrate, *Mongé*; saw the wounds of deceased, and from them he judged he had very little time to live; deceased said before and after giving his declarations that he would die, 'qu'il allait mourir.' The appearance of deceased indicated that he was conscious of his approaching dissolution." Upon this foundation, the District Judge permitted the declarations of the deceased to be given in evidence. To which opinion of the Court admitting the said testimony the defendant took his bill of exceptions. We think the Judge did not err. After the defendant had himself objected to those declarations reduced to writing, in the form of an affidavit, for his arrest, he could not with any propriety turn round and object to evidence being given by parol, as related above, of what the deceased did declare before the magistrate. Depositions of the deceased taken in writing by a magistrate, in the Hospital where he lay, but not in the presence of the prisoner, were offered in evidence, it being objected that those depositions could not be read, as not having been taken pursuant to the Statute, 10 Car. c. 1. (Irish.) *Downs, J.*, ordered the magistrate to be sworn, and he having deposed that the deceased at the time of making those depositions, was impressed with the fear of immediate death, his parol testimony of the facts declared by the deceased was admitted. *Roscoe's Criminal Evidence*, p. 38. *McNally*, 385. The magistrate, perhaps, should have been examined in preference to the witness who was a mere looker-on at the taking of the affidavit of the deceased, but this objection was not made in the Court below.

The defendant then moved for a new trial, and an arrest of judgment, upon the following grounds: First, that the Court had no right to appoint under the circumstances of this case a District Attorney *pro tem.* to prosecute for the State. The reasons given in the opinion of the District Judge on this point are to our minds perfectly satisfactory, and we think the appointment was well made. Second, that there had been irregularities in summoning the Jury, in the service on him of the list of Jurors, &c., and that the verdict of the Jury was contrary to law and evidence. These alleged defects are all specially set forth in the pleadings aforesaid, and passed upon in the judgment of the District Court. We refer to them merely without copying them in this decision, because they have been all considered and well answered in the opinion of the District Judge, whose reasons for overruling the said motions we adopt as our own.

The judgment of the District Court is therefore affirmed with costs.

CASES NOT REPORTED.

NEW ORLEANS.

Florence v. Bidault.	Duggan v. Municipality No. 2.
Cowans v. Harris.	Succession of Estebon Hunley v. Pome- roy et al.
Thompson v. General Mutual Insur- ance Company of New York.	Succession of Kimball.
Montgomery et al v. Forsey.	Holden et al v. Clifton et al.
Patrick & Co. v. Perry et al.	Bachino v. Weaver.
Peet et al v. Same.	Hyde et al v. Guay.
Pickerell v. Kennedy et al.	Kohn v. McCollum.
Fortier v. Mason.	Calmes v. Stone.
Bergier v. Laborde.	Featherston v. Compton, Kendall, Gar- nishee.
Robertson v. Fausset.	State v. Judge Third Dist. Court.
Lapere v. Osgood et al.	Dolbear v. Fitzsimmons.
Donner v. Decoux et al.	House v. Couch.
State v. Cazes.	Houston v. Wilkinson.
Bradford v. Burgen.	Phillips et al v. Couch.
Soulié v. Hezeau.	Ferguson v. Downs.
Stapleton v. Caire.	Oakey et al v. Miller.
Adams v. Wells et al.	Dunn v. Woodward.
Collins v. Hamilton.	Simpson v. Austin et al.
Gillespie v. Devall.	Brannin v. Brannin.
Blosman et al v. Ex. of Heligsburg et al.	Rhodes v. Babin.
Porche v. Kauffman.	Nichols v. Bethea.
Williams v. Heirs of Nicholson.	Benneteau v. Ballinger.
Hitchcock v. Connolly et al.	Bonzano v. Carr.
Peck v. Freret.	Lewis et al v. U. S. Life Insurance, Annuity & Trust Company.
Broom v. Thomas.	Heirs of Spurlock v. Blackburn et al.
Van Ostern v. Hart et al.	Nelson v. Glasscock.
White v. Wilson.	Pike et al v. Merrit et al.
Dunbar v. Mayo.	Niles et al v. Pipes.
Forbes v. Strawbridge.	Dupau v. Merchants Insurance Co.
Eoff v. Thompson.	Ross v. Leib et al.
Lee v. Ferguson et al.	Ledoux v. Monaghan.
Lee v. Dyas.	Limonin v. N. O. Insurance Company.
Watt et al v. Fort.	Prescott v. Long.
Jewell v. Crandall.	Smith v. Succession of Gordon.
Neathcy v. York.	Same v. Gordon et al.
Roy v. Gorton et al.	Lambeth et al v. Anderson et al.
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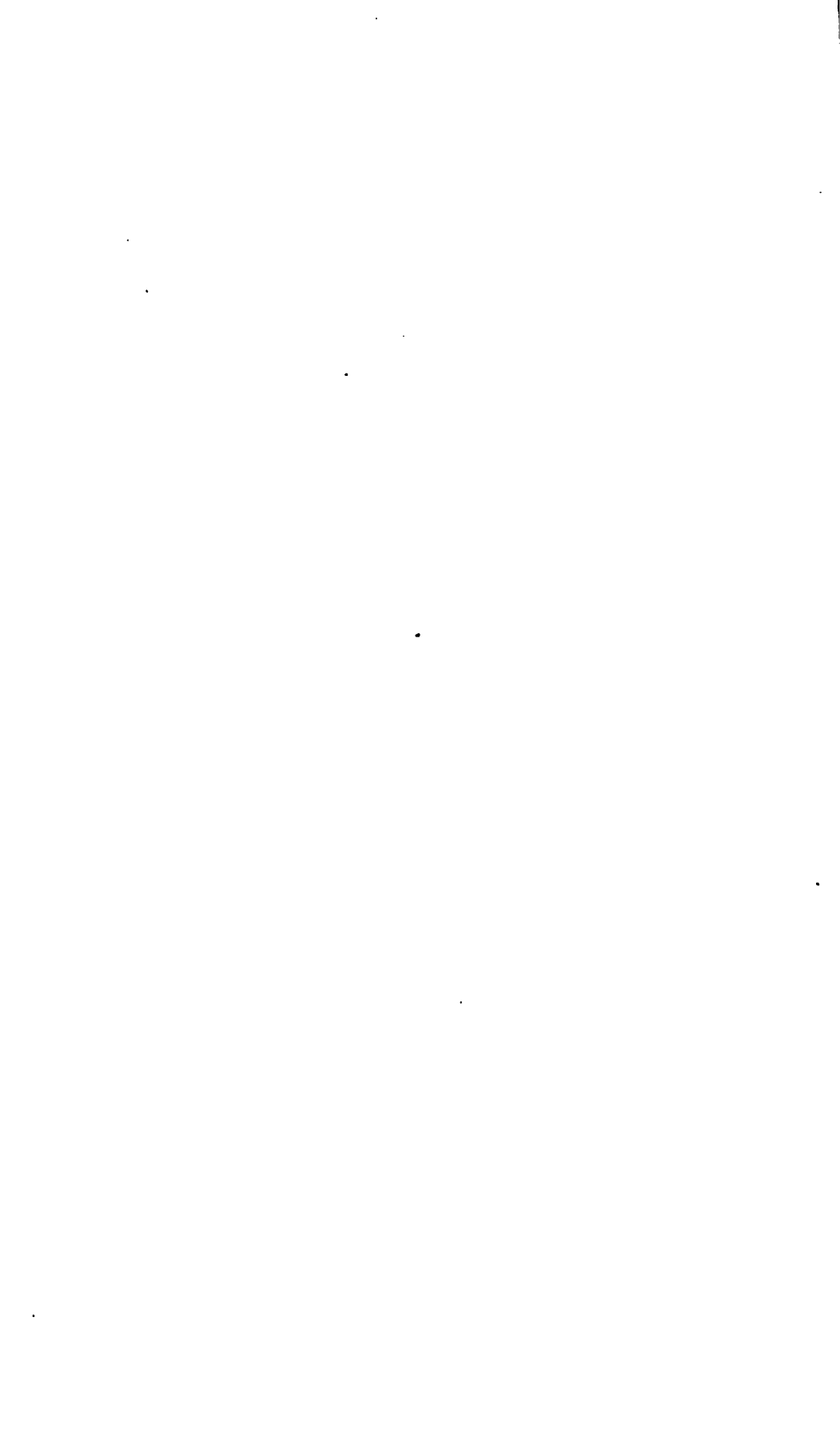
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Maskell v. Haighfleigh.	Owner of Steamboat Mat Johnson v. Parker.
Broussard v. Cade.	Dartigues v. Haighfleigh.
Armstrong v. Hutson.	

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Dick et al v. Splane.	Splane v. Vincent.
St. Gaudrain v. Miller et al.	Moncure v. Maskell.
Mouton v. Cottrel.	Maskell v. Allen.
Scribner v. Ferguson,	Capdeboscq v. Allen.
Grover v. Nash.	Succession of Kemper.
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Brashear v. Brashear.	Rington, Davis et al v. Wilcoxon.
Keys v. Duncan.	Robert v. His Creditors.
Harding v. Picket.	Beirne et al v. O'Bryan.
Mason et al v. Muggat et al.	Bue et al v. Splane et al.

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Where a reference is made under any head, the figures refer to the corresponding figures in the Index, and also to the paging of the volume. This plan has been adopted in order to enable the reader to turn at once to the case, should he so prefer, without previously consulting the Index.

ACTION.

1. Actions *en declaration de simulation* may be brought on all claims sounding in money, although they be liquidated by a judgment, or pending in other suits.
Prescott v. Spurlock, 7.
2. In these actions an incidental prayer for judgment on a claim for which there is a pending suit—in the event that none shall have been rendered in such suit—is not sufficient to defeat the main action, and on proper proof, the simulation may be decreed, although there should be no judgment for the amount demanded.
Ibid.
3. An attachment suit in Mississippi, where nothing is shown to have been made, is no bar to a personal action here.
Clampitt v. Newport, 124.
4. In an hypothecary action against a third possessor, Articles 69 and 70 of the Code of Practice, and Article 8865 of the Civil Code, require no other formality than the plaintiff's affidavit that he had demanded payment of his debtor thirty days before presenting his petition for an order of seizure and sale.
Wilcoxon v. Maskell, 480.
4. The plaintiff in a petitory action is not bound to show title in himself good against the world. He is only required to produce a title as owner "*causa idonea ad transferendum dominium*," to repel the presumption of ownership, resulting from mere possession; and the date of his title ought to be anterior to the possession of the defendant.
Gravenberg v. Savois, 499.

ADMINISTRATORS AND ADMINISTRATION.

1. An administrator of an estate is bound, legally and morally, to manage its affairs with at least as much prudence as he would his own, and, if disregarding it, he pays more for services, professional, or otherwise, rendered the succession, than they could have been procured for, he violates his duty, and must bear the loss.
If an administrator unadvisedly institutes suit, the estate ought not to suffer loss by it.
Porche v. Creditors of the Succession of Banks, 65.
2. An administrator has no right to claim from an heir the delivery and possession of property of which the heir became an undivided proprietor with his co-heirs on the death of the common ancestor; without suggestion, or proof that such property is necessary for the payment of the debts of the succession.
O'Neal v. Oates, 78.

ADMINISTRATORS AND ADMINISTRATION, (*continued*).

3. Letters of administration make full proof of the party's capacity until they are revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.
Dean, adm., v. Wade, 85.
4. Note alleged to be given to plaintiff, as administrator, for the price of an improvement, or pre-emption on public land—and that plaintiff contracted to make defendant a title thereto. *Held*: Such a contract could only bind plaintiff personally. *Ibid*.
5. The validity of the appointment of Curator can be inquired into collaterally, when such appointment is not good on its face.
Wilson v. Imboden, 140.
6. The commission to which an administrator is entitled is two and a half per cent. upon the amount of the inventory, deducting bad debts.
C. C. 1062. Succession of Gautier, 451.

See Clerks of Court—*Wilson v. Imboden*, 140.

See Obligations—*Winthrop v. Jarvis*, 484.

ALEATORY CONTRACTS.

It is of the essence of aleatory contracts that there should be risk on one side or on both, and that all risks appertaining to the contract and not excepted, are assumed by the parties. *Moore v. Johnston*, 488.

APPEAL.

1. Where an appeal is taken by the plaintiff, and the names of the warrantors, who are immediately interested, do not appear, either directly, or by implication in the appeal bond, the appeal will be dismissed.
Williams v. Courtney, 63.
2. An appeal will not be entertained, in a case where there are warrantors, unless the warrantors are made parties in the appellate Court.
Blanc v. Cousin, 71.
3. No amendments can be made to the judgments of the District Courts, if the appellee does not ask for them in the manner required by the Code of Practice.
A judgment cannot be amended in favor of the appellee, and damages, at the same time, allowed him for a frivolous appeal.
Hood v. Knox, 73.
4. The proviso to the second section of the Act of 22d March, 1843, relative to appeals and notices of judgment, does not apply to the parish of Jefferson. *State v. The Judge of the Third Judicial District*, 89.
5. Where, in a judgment rendered, the amount is left in blank in the record, the appeal will be dismissed.
Adams v. Routh, 121.
6. The Supreme Court is without jurisdiction when the matter in dispute does not exceed three hundred dollars. *Kellar v. Palfrey*, 282.
7. An appeal will be dismissed when all the parties to the judgment are not made parties to the appeal. *Armstrong v. His Creditors*, 367.

APPEAL, (*continued*).

8. Action against three defendants to annul a will and for damages. Each filed an exception that there was a misjoinder of actions. C. specially excepted on the ground that his co-defendants were made parties for the purpose of depriving him of their testimony. The exceptions were sustained, as to the co-defendants, and the suit dismissed as to them—but the plaintiff's right to proceed against C. was maintained. Plaintiff appealed—and on motion to dismiss the appeal because C. had not been made a party to it—it was *Held*: that C. should have been made a party. The dismissal of his co-defendants from the suit is a judgment which he has the greatest interest in maintaining, as he specially excepted that they were made parties in order to deprive him of their evidence. Appeal dismissed. *Bourbon v. Castera*, 383.
9. It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without the means of reviewing the case, and the appeal will be dismissed. *Harris v. Hays*, 483.
10. After an order is made and signed, granting a suspensive appeal and approving the bond furnished by the appellant, the jurisdiction of the District Court is incompetent to disturb the order. *State v. Judge of the Fifth District Court*, 434.
11. *By the Court*: When the record comes up without the evidence, nothing can be assigned as error in the Supreme Court that could have been cured by evidence in the Court below. *Pellerin v. Levois*, 436.
12. The defendant, in injunction, is under no obligation to have the evidence taken down in writing for the use of his adversary—in case the latter should wish the appeal. *Ibid*.
13. Damages allowed for a frivolous appeal. *Kennedy v. Hynes*, 439.
14. Where there is nothing in the record to show that the matter in dispute exceeds three hundred dollars, the appeal will be dismissed. *Bersheim v. Hudson*, 456.
15. Petition dismissed, as in case of nonsuit, for want of proper parties to the action. *Leonora v. Scott*, 460.

ARREST MALICIOUS.

1. Action for malicious arrest in a civil suit. Defendant's counsel asked the Court to instruct the Jury: That in order to enable the plaintiff to maintain this action against the said defendants, it is necessary for him to prove malice; or that the arrest complained of was made, or procured to be made by the said defendants from malicious motives, and without probable cause. *Gould v. Gardner, Sager & Co.*, 11.
2. That if the Jury believed from the evidence that the said defendants in making or procuring said arrest, acted under the advice of counsel, given in good faith, and believed at the time that they had a good cause of action against him, the said *Gould*, and a legal right to hold him to bail therefor; that they, the said defendants, are not liable in damages to the said plaintiff in this action. The Court refused so to charge the Jury. *Held*: that the Court erred. *Ibid*.

ATTACHMENT.

1. Whenever the owner has parted with his control over the goods, and cannot change their destination, his creditors cannot attach; but, whenever the owner can sell and deliver, the creditor may seize.

Hill, McLean & Co., v. Simpson, 45.

2. The surety, on a bond for the delivery of property attached, is not exonerated because the judgment against the principal did not decree the property attached to be sold. Whatever may have been the form of the judgment, the condition of the bond would have been satisfied by the delivery of the property attached.

Guay v. Andrews, 141.

3. In proceedings against a surety on the replevin bond of a defendant in attachment, the return of no property found, contemplated by the Act of 1839, is to be made by the Sheriff of the parish in which the judgment in the attachment suit was obtained—and not by the Sheriff of the parish to which the defendant, in the attachment, may have removed.

Ibid.

4. Suit for damages for wrongful attachment. Defendant pleaded that plaintiff had *illegally neglected* to bond the property attached. *Held*: The right to set aside an attachment by delivering to the Sheriff an obligation to satisfy the judgment that may be rendered against him, is a privilege which the law accords to the defendant—and not a duty enjoined, and the attaching creditor cannot complain if the defendant fails to exercise it.

Watson v. Kennedy, 280.

5. In cases of this character, based on the tortious acts of defendant, the jury are the legitimate judges of the *quantum* of damages, and the law leaves them much discretion.

Ibid.

6. It is competent for the garnishee to plead all defences which may be necessary for the protection of his own interest. Of such a nature is a plea which shows that the plaintiff cannot recover against him, because the law, under which he is proceeding against the defendant, is repealed.

Featherston v. Compton, 285.

7. An attachment will defeat a claim for advances, when the attachment has been served before the receipt of any bill of lading or letter of advice.

Magoun v. Davis, 315.

8. The release by the plaintiff in attachment in Mississippi, of any claim on the Sheriff resulting from his allowing the slaves attached to remain with the person holding possession of them, in no way invalidates the seizure.

Myers v. Myers, 369.

9. In Mississippi the Sheriff who seizes slaves may retain possession of them, as well through the agency of a keeper, or an overseer, as by one of his deputies.

Ibid.

For Judgment in—see Judgment—Succession of Caldwell, 43.
See Sheriff—Succession of Caldwell, 45.

ATTORNEY AT LAW.

1. It often occurs that the valuable services of counsel enure to the benefit of others than those who have employed them. Large interests often include small ones in matters of litigation. For such services counsel cannot recover against parties who did not employ them.

Cooley v. Cecile, f. w. c., 51.

2. It is true, as a general principle, that the authority of an attorney at law cannot be disputed, except under certain circumstances; but the principle only extends to cases in which he is acting within the limits of the duties which his profession imposes on him. When disputed, the authority of an attorney at law, not of record, requires proof, as in cases of agency.

Succession of Barr, 458.

BAIL.

1. When the obligation of a bail bond is for the prisoner to appear and remain until discharged by due course of law, the sureties are bound, though the prisoner be indicted for an offence different from that for which he was committed.
2. A recognizance should be endorsed as filed in Court, and should state the cause of its caption, and if it does not, it cannot be explained by reference to the indictment, found after it was entered into.

State v. Ridding, 79.

State of Louisiana v. Smith, 471.

3. It is a good defence for the surety on a forfeited recognizance, that the principal had been tried and acquitted of the offence for which he was bound over, since the forfeiture.
4. So long as the opinion of a majority of the Court, in *The State v. Longworth*, prevails, a party convicted of a bailable offence, may be released by Habeas Corpus, after final judgment.
5. The rule, that in whatever manner a man binds himself he shall remain bound, may be true in mere conventional obligations, but in criminal cases no bonds are obligatory except those taken in pursuance of law.

Lafleur v. Mouton, 489.

Governor v. Fay, 490.

Ibid.

BILLS AND NOTES.

1. The holder of a promissory note bearing five per cent. interest, took a new note bearing eight per cent. interest, payable one day after date.—*Held:* the endorser was discharged.
2. Notarial Certificate of notice of non-payment, put in the Post Office at Baton Rouge, was headed as follows: "Baton Rouge, May 19, 1852. *Mr. John Buhler*—Parish of West Baton Rouge—Lobdell's Store Post Office, La." It was objected that this was no proof that the letter to *Buhler*, on the outside, was directed to any place. *Held:* that the Certificate was sufficient.
3. Where the first and second of a bill of exchange were both accepted, with the knowledge and consent of the drawers, and without fraud or collusion between the holders and acceptors, the drawers will be bound on both.
4. Suit on a promissory note payable to *Richard Clappitt*, administrator, &c.

Held: the endorser was discharged.

Shaw v. Nolan, 25.

Held: that the Certificate was sufficient.

Knox v. Buhler, 69.

Wright, Williams & Co. v. McFall, 120.

Held: *Clappitt* might sue in his individual name.

Clappitt v. Newport, 124.

BILLS AND NOTES, (*Continued*).

5. When a party sues upon a note that has been destroyed, it is not necessary to allege or prove that the destruction was advertised.
Beebe v. McNeill, 130.
6. The protest of a bill of exchange stated that the bill was presented for payment at the office of the drawees, to a gentleman styling himself book-keeper of the house, and who answered that he was duly authorized to say that the bill would not be paid. *Held*: This was a sufficient presentment and it was not necessary that the notary should certify that the drawees were at the time absent from the counting room.
Wesson v. Garrison, 186.
7. The relations of drawer and acceptor create no right to call the acceptor in warranty.
Ibid.
8. Action on a promissory note. The protest stated, that the notary "demanded payment of said note of the proper officer at the U. B. Bank, Clinton, where it was made payable." In the note, the words used were, "payable at the Branch of the Union Bank of Louisiana at Clinton"—and a copy of the note accompanied the protest. *By the Court*: This is a sufficient designation of the place where payment was demanded, and the certificate made is sufficient, without further designation, of the particular officer to whom the presentment was made.
Lathrop, Adm'r. v. Delee, 170.
9. Where the notice was deposited in the Post Office, at Clinton, without being addressed to any particular place, and it was shown that the endorser lived upwards of three miles from Clinton, and that the endorser resorted to the Clinton Post Office for his letters, and it did not appear that there was a nearer Post Office, the holder was not bound to send a messenger to him with the notice.
Ibid.
10. In a suit on a promissory note, the general issue is an admission of the signature.
Tyler v. Marcelin, 312.
11. A bill of exchange drawn by a citizen of Louisiana, upon and accepted by citizens of Louisiana, and payable to the order of a citizen of Louisiana, will be understood as intended to be made payable in Louisiana, if no stipulation to the contrary appear.
Northern Bank of Kentucky v. Squires, 818.
12. Where a bill of exchange is accepted by a merchant living and transacting his business in Louisiana, the reasonable expectation of all parties must be that it is to be paid in Louisiana. (SLIDELL, C. J.) *Ibid*.
13. Action against the acceptor of a Bill payable to the order of the drawer, who endorsed it to the plaintiff. The signature of the endorser was proved by a comparison of it with that of the drawer. The Court considered the evidence sufficient—as the acceptance admitted the signature of the drawer.
Whitney v. Bunnell, 429.
14. Suit on a note expressing that it was given for a fee in a certain cause. The Court held that evidence going to show that the note was given for other considerations than those specified on the face of it, was properly rejected.
Dwight v. Kemper, 452.

BILLS AND NOTES, (*Continued*).

15. The position is inadmissible that the formula "ne varietur" on a note, makes the equities between the original parties binding on the endorsees.
Maskell v. Haighfeigh, 457.
16. The maker of a promissory note, transferred by the holder to the vendor of property, cannot resist payment on the ground that the vendor had no authority to sell.
Wartelle v. Hudson, 486.
17. Suit on a note payable to the order of H. & R., but endorsed by H. alone.
By the Court: The defective endorsement on the note was cured by the subsequent declaration of R., that H. was authorized to use the notes as he did: the date of that declaration is immaterial.

Ibid.

CLERKS OF COURTS.

1. Clerks of Courts have no authority, under the act of 1888, to appoint administrators of estates, under five hundred dollars, when no one will accept their administration and give security.
Wilson, Curator v. Imboden, 140.
2. The Act of 1846 does not authorise Clerks of Courts to appoint administrators of small successions, but requires them to assume their administration themselves.

Ibid.

CODE CIVIL.

ARTICLES CITED.

143. Perkins, jr. v. His Wife—14.
 174 }
 177 } Heirs of Trahan v. Trahan—455.
 398 }
 400 } Lobdell v. Union Bank—117.
 985. McMasters v. Place—431.
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 1506 }
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 3158 }
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 3219 } Succession of Caldwell—42.
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 3429. Blanchard v. Decuir—504.

CODE OF PRACTICE.

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- 68 } Gomez v. Courcelle—304.
 69 }
 69 } Wilcoxon v. Maskell—460,
 70 }
 329. Corbett v. Costello—427.
 374. Patterson v. Frazer—512.
 620. Maskell v. Haighfeigh—457.
 711. Judice v. Kerr—461.
 746. Featherston v. Compton—285.

COMMON CARRIERS.

1. In an action against a common carrier for damages to goods, the proof must be clear and certain, to relieve him from liability, that the damages did not arise while the goods were in his hands; for the presumption is against him not only from the terms of the bill of lading, but from the policy of law. *Bond v. Frost*, 297.
2. In suits against common carriers the testimony in their behalf of their clerks and servants, must be received with great caution, *Ibid*.

COMMUNITY.

1. When a married woman, not separated in property, is engaged in trade, she will be presumed to trade on the funds of the community in the absence of proof to the contrary, and the assets in her hands will be liable for community debts. *Pendergast v. Cassidy*, 96.
2. The profits of the labor of husband and wife belong to the community. *Ibid*.
3. Action by collateral heirs of the wife to set aside an act emancipating a slave made by the husband and wife. *By the Court*: As head and master of the community, the husband has clearly the right, during its existence, to alienate the property belonging to it, and even to dispose of it by gratuitous title, if not made in fraud, or to the prejudice of the wife. *Heirs of Trahan v. Trahan*, 455.

See Husband and Wife.

COMPENSATION.

1. A stockholder in the Clinton and Port Hudson Railroad Company, who holds the bonds and coupons belonging to the series for which his mortgage is pledged, may plead the same in compensation of his stock subscription. *Haynes v. Kent*, 182.

CONSTITUTIONAL LAW.

1. Constitutionality of a fine imposed by the Police Jury of West Baton Rouge affirmed. *West Baton Rouge v. Robertson*, 69.
2. The tax imposed by the town of Baton Rouge upon public exhibitions is a mere police regulation, necessary to the order and the very existence of towns and cities, and not restrained by any provision of the Constitution of the United States.

Board of Selectmen v. Spalding & Rogers, 87.

CONSTITUTIONAL LAW, (*Continued*).

3. The duration of an office which is held by executive appointment, and and having no term fixed, can be filled at the pleasure of the Executive, is not enlarged by Article 96 of the Constitution of 1845, which provides that "the duration of all offices, not fixed by this Constitution, shall never exceed four years." This article is a restriction upon the Legislature, and applies to those offices which were held either during good behavior, or for a longer term than four years. It does not enlarge the tenure of an office held by the will of the Governor.

State v. Crozat, 295.

4. The Act of April 10, 1811, provides that "for the parish of Orleans there shall be for the city of New Orleans an office of record of births and deaths, whereof the officer shall be appointed by the Governor." An office, thus created, is held during the pleasure of the appointing power. That appointing power was, originally, the Governor, and it is doubtful whether the Constitution of 1812, (Sec. 9, of Art. 8,) making the Senate a component part of the appointing power as to officers established by *that Constitution*, and whose appointment was not therein otherwise provided for, made any change in the mode of appointing the Recorder of Births and Deaths. (BUCHANAN, J.)

Ibid.

5. Whether the appointing power be vested in the Governor alone, or in the Governor and Senate, by the terms of the law creating the office of Recorder of Births and Deaths, it is an office *durante bene placito*. No term of duration was fixed by the Statute creating the office, and when such is the case, the office is not to be taken, or intended as an office during good behavior, but an office during pleasure. (BUCHANAN, J.)

Ibid.

6. Article 96 of the Constitution of 1845 has nothing to do with offices, of which the tenure, under the law creating them, was *during pleasure*. That Article limits the duration of offices held during good behavior to four years. The tenure, *during pleasure*, is not susceptible of limitation, as it is subject to the will of the appointing power. (BUCHANAN, J.)

Ibid.

7. The order of a Court of this State, made under the authority of a law of this State, accepting a surrender of an insolvent's property, and staying all proceedings against him, precludes any creditor from instituting a suit in a Court of this State—unless the law itself is a nullity.

Northern Bank of Kentucky v. Squires, 318.

8. The State, in its sovereign capacity, can exercise the fullest authority over its own tribunals, and prohibit citizens of other States from suing in them on contracts made either in or out of the State, unless there is some superior power by which her authority in this respect is circumscribed.

Ibid.

9. The insolvent laws of this State expressly extend their operation to all persons, whether citizens of other States, or foreigners, and all contracts are declared to be affected by them, whether made in, or out of the State.

Ibid.

CONSTITUTIONAL LAW, (*Continued*).

10. It is settled by judicial authority:

1st. That the insolvent, or bankrupt laws of a State, if not suspended by the enactment of an uniform bankrupt law by Congress, are constitutional and valid as to all posterior contracts entered into between citizens of the State where such laws exist, and equally so whether they affect the obligation, or the remedy.

2d. That a discharge, under such laws, as between citizens of the State where the discharge is granted, and as to contracts made and to be executed there, is valid and binding everywhere.

3d. That it is only in regard to contracts made between citizens of different States, and not stipulated to be performed in the State where the discharge is granted, that the validity of such discharge can be questioned, if at all, in the Court of the State where it was granted; although in the Courts of the United States, according to their existing jurisprudence, a discharge, under these circumstances, would not be held good as a plea in bar. *Ibid.*

11. I cannot understand by what right the transferee of a Louisiana creditor can ask a Court of Louisiana to disregard its own insolvent laws and violate a *cessio honorum*, and a stay of proceedings, regularly adjudged in a Court of Louisiana. Such a doctrine, it seems to me, would involve principles subversive of State sovereignty, and for which I can find no sufficient warrant in the Constitution of the United States. (SLIDELL, C. J.) *Ibid.*

12. The Act of March 12, 1852, "providing for the subscription by the parishes and municipal corporations of this State to the stock of corporations undertaking works of internal improvements, and for the payment and disposal of the stock so subscribed"—is constitutional.

Police Jury v. Succession of McDonogh, 341.

13. The restrictions imposed by Articles 108 and 109 of the Constitution of 1852, upon the aid which the State may grant to corporations for internal improvements, is no limitation upon the aid which the Legislature may authorize the Police Juries, &c., to grant. *Ibid.*
14. The provision in the Act of 1852, requiring that no ordinances imposing a tax for works of internal improvements shall be valid, unless it has been ratified by a majority of the voters on whose property it is proposed the tax shall be levied—is not unconstitutional, nor at variance with the spirit of representative government. *Ibid.*

15. The burden imposed under the act of 1852 is a tax, with regard to which each citizen has not a right to decide, authoritatively, for himself alone, whether the tax is for a useful purpose, and will redound to his individual advantage. If each citizen can be permitted to complain that his tax has been increased without his individual assent, and for a purpose of which he, individually, disapproves, all government would be at an end. Of the public good which warrants a tax, the Legislature, for general purposes, and the duly constituted local authorities, acting under the express will of the Legislature for local purposes, are to judge.

Ibid.

CONSTITUTIONAL LAW, (*Continued*).

16. The power of taxation, and that of taking private property for public use, are distinct things. In the latter case, previous compensation must be made. In the former, though in taking a man's money by taxation you do take his property, the compensation is considered as simultaneously given in the benefit, which, as a citizen, he enjoys in common with his fellow-citizens, in the public welfare and the public prosperity, to the advancement of which the money is to be applied. *Ibid.*
17. The provision that the contribution levied shall entitle the contributor to stock in the corporation, cannot be regarded as a grievance, and in no respect changes its character as a tax. *Ibid.*
18. The Constitution of 1845 was superseded and not amended by the Constitution of 1852. (SLIDELL, C. J.) *Sigur v. Crenshaw*, 401.
19. The Article 144 of the Constitution of 1852 was framed in order to prevent the *interregnum* that would otherwise occur from the displacement of the old government and the organization of the new. (SLIDELL, C. J.) *Ibid.*
20. It was not intended by the Constitution of 1842 that the old incumbents of office were to hold until the expiration of their respective terms, but only until their successors were appointed. (SLIDELL, C. J.) *Ibid.*
21. When the people in the exercise of their sovereignty, deliberately put an end to the existing constitution, and adopt an entirely new one in its stead—all powers of government under the old constitution necessarily cease, except in so far as they are maintained in existence by the new constitution. No one has such a vested right to office as to resist the necessary consequence of an entire abrogation, by the people, of the constitution, under the authority of which he holds it. Rights to property and the obligation of contracts stand on a different footing, and I do not understand Art. 143 of the constitution as applicable to the right to an office. (OGDEN, J.) *Ibid.*
22. The Constitution of 1852 was intended as an abrogation of the constitution of 1845—and not merely as a change in some respects of an existing State government. (OGDEN, J.) *Ibid.*
23. Under the constitution of 1852 the Governor had the power, with the advice and consent of the Senate, to appoint a new Register of the Land Office, and on such appointment the right of the incumbent ceased. (OGDEN, J.) *Ibid.*
24. I feel bound to construe the two articles, 143 and 144 of the constitution of 1852, in such a manner as to give effect to both—if that be possible. The conclusion to which that rule of construction has led my mind is, that the appointing power of the government, organized under the constitution of 1852, is to be exercised with reference to pre-existing laws—and to rights acquired by individuals under pre-existing laws—in all cases where such laws and such rights are not inconsistent with the constitution itself. (BUCHANAN, J., dissenting.) *Ibid.*

CONSTITUTIONAL LAW, (*Continued*).

25. The sanctions of the law—the rights of persons were only disturbed by the constitution of 1852, in those cases and to that extent that the constitution contained declarations inconsistent with particular statutes and particular rights. (BUCHANAN, J., dissenting.) *Ibid.*
26. The Register of the Land office having been appointed to office under an Act of the Legislature, which fixed the tenure “at two years, unless removed in due course of law—and unless all said lands shall be sold before that time, when it shall be in the power of the Governor to discontinue the office”—and the limitation specified in the Act not having occurred—the constitution of 1852 gave to the executive no authority to supersede him. (BUCHANAN, J., dissenting.) *Ibid.*
27. Allowing and fixing the amount of bail are judicial acts, which the Executive is prohibited from doing by the second article of the Constitution. *Governor of Louisiana v. Fay*, 490.
28. The power of bail is not incidental to the power of granting reprieves. *Ibid.*
29. Article 127 of the Constitution of 1845, does not restrict the power of School Directors in the imposition of taxes under the Act of 3d May, 1847. *Bordelon v. Lewis*, 472.

CONSTRUCTION.

1. The title of an Act cannot control the plain meaning of the words in the body of the Statute. *State v. Cazeau*, 109.
2. The Act of Congress of 3d March, 1849, which authorizes the Secretary of the Treasury to discharge the sureties of *Thomas Gibbes Morgan* from the payment of one-third of the judgment against them, on their paying or securing the residue, does not assign to the sureties the rights of the Government against parties with whom *Morgan* had dealt officially. The assignment made by the Secretary to the sureties, and the permission given by that officer to them to use the name of the United States for their benefit, was unauthorized by law. *United States v. Union Bank*, 389.

For Construction of Wills,
See Donations and Testaments—*State v. Executors of McDonogh*, 171.

CORPORATIONS.

1. It would be a doctrine fraught with the most dangerous consequences to stockholders, and inconsistent with the theory of corporations, to hold that the private knowledge of two Directors, not clothed with any special authority in the premises, and constituting a small minority of the Board—and which knowledge was not disclosed to the Board—should destroy the rights of the Corporation. *Mercier v. Canonge*, 37.
2. Municipal Corporations are expressly authorized to receive legacies by the Louisiana Code; their capacity, in this respect, is recognized by Article 423, and by the whole course of legislation on the subject. *EUSTIS, C. J.* *State v. Executors of McDonogh*, 170.

CRIMINAL LAW.

1. Information for selling spirituous liquors to slaves without consent of masters, &c. *Held*: If the owner of the slave, or person having him in charge, sent the slave to buy, or receive the spirituous liquor from the defendant, for the purpose of inducing the defendant to commit the offence charged in the information—then the act committed was done with the assent of the owner, or person having the slave in charge—and the material ingredient of the offence is wanting. *State v. Geze*, 52.
2. There is no objection to the insertion of several offences of the same nature in an indictment in separate counts, though differing from each other in degree and punishment, when these offences are all felonies.
The State v. Cuseau, 109.
3. The right to compel the prosecutor to elect on which charge he will proceed, is confined to cases where the indictment contains charges which are actually distinct, and which grow out of different transactions.
Ibid.
4. The term felony means a crime of great magnitude, and subject to an infamous punishment—death, or imprisonment at hard labor. *Ibid.*
5. In an indictment against several, where the offence is such that it may have been committed by several—they are not of right entitled to be tried separately—but are to be tried in that manner only when the Court on sufficient cause, may think proper. *Ibid.*
6. The Supreme Court cannot review, in criminal cases, the acts of a Judge of the first instance, resting in his discretion. *Ibid.*
7. In an indictment against several, each defendant is entitled to his peremptory challenge. This is not a right to select, but a right to reject—and no one defendant can complain that jurors not challenged by him, have been challenged by a co-defendant. *Ibid.*
8. The plea of *autrefois convict* is a special plea in bar of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful upon a sufficient indictment.
State v. Foster, 290.
9. Where the indictment alleges that the prisoner had fled from justice, the proclamation of the Governor offering a reward for his apprehension, was admissible in evidence to sustain the allegation. *Ibid.*
10. Where the mortal stroke is given in this State, but the death occurs in the State of Mississippi, the crime may be prosecuted in the parish where the mortal stroke was given. *Ibid.*
11. When the wound was inflicted on board of a vessel in Lake Borgne, but moored to a wharf in the parish of St. Bernard, the Courts of that parish can entertain jurisdiction over the offender. *Ibid.*
12. Where the record shows an appointment by the Court of an attorney to defend the accused, the Supreme Court will not inquire whether such attorney has been duly licensed to practice law.
State v. Kentuck, 308.

CRIMINAL LAW, (*continued*).

13. In an indictment against a slave under the 54th section of the Act of June 7. 1806, it is not necessary to charge the intent with which the act was done. *Ibid.*
14. On the trial of slaves in the tribunals established for that purpose, the law does not require an observance of the technical rules which regulate criminal proceedings in the higher Courts. *Ibid.*
15. When the accused declares himself ready for trial and accepts the jurors, he cannot afterwards object that the list of jurors, with which he was served, contained the names of persons who were exempt and of persons who had served on the Grand Jury, by which the indictment was found. *Ibid.*
16. So it is too late, under the same state of facts, to object that the accused was not served with a list of the names of jurors summoned by special venire. *Ibid.*
17. The District Courts have authority, under the Act of 1817, to appoint an attorney to prosecute on behalf of the State in the absence of the District Attorney. *State v. Viaux*, 514.

See Supreme Court—*State v. Cammeyer*, 319.

DAMAGES.

1. In an action for the wrongful abduction of a minor, the jury has a right to consider the mental pain inflicted upon the child as a legitimate subject of amend. *Brown v. Crockett*, 30.
2. Plaintiff, for months, left a loaded gun, resembling a walking cane, in her yard. It was taken up by a boy, about fourteen years old, belonging to defendant—in whose hands it went off and killed the plaintiff's slave. Plaintiff sued for damages. *Held*: It was the plaintiff's negligence which was the occasion of the accident, and this is sufficient to prevent her recovery. *Audige, f. w. c., v. Gaillard, f. m. c.*, 71.
3. Where the declarations of the defendant concerning the plaintiff appear to have been uttered without malice, and under circumstances from which no malice is in law implied, they carry with them no pecuniary responsibility. *Gilbert v. Palmer*, 180.
4. Parties who obstruct the use of the public road are liable in damages. *Small v. Bonnabel*, 292.
5. A plaintiff who neither arrests the defendant, nor disturbs her property, will not be mulcted in damages, because it turns out that he was mistaken as to what he supposed were his legal rights. *Cade v. Yocum*, 477.
6. Damages allowed for the wrongful issuance of a provisional seizure for rent, without malice. *Fleetwood v. Dwight*, 481.

See Arrest Malicious—*Gould v. Gardner, Sager & Co.*, 11

See Injunction—*Woods v. Wyke*, 18.

See Sale—*Fuller v. Corwell*, 188.

See Sale Judicial—*Loddell v. Union Bank*, 117.

DONATIONS AND TESTAMENTS.

1. A testator can leave to his concubine only movables to the value of one-tenth of his estate. *Adams v. Routh*, 121.
2. A bequest in the following words: "I give and bequeath, in consideration of her good and faithful services, to the free *griffe* woman *Cécile*, three arpents front of my land, to be taken from the line of the plantation of *Honoré Faure*, with the whole depth, to be enjoyed by her during her life in usufruct; the said land, after her death, to belong to her children"—is a particular legacy. *Cécile, f. v. c.*, v. *Lacoste*, 142.
3. A particular legatee is not bound to contribute to the payment of the debts of the succession, where the succession is rich; and an usufructuary, under a particular title, is not bound to discharge the debts for which the property bequeathed is mortgaged. *Ibid.*
4. The universal legatee is, by law, bound to discharge the debts of the succession. *Ibid.*
5. If the effect of the testamentary disposition to *Cécile* is held to vest the property in the heirs, legal or testamentary, a substitution would be created in relation to it, and the disposition itself would fail. *Ibid.*
6. There can be no doubt that the intention of the testatrix was, to vest the property in the children of *Cécile*, and give her the usufruct, to terminate at her death, provided her life did not extend beyond the term assigned by law for the duration of an usufruct. *Ibid.*
7. The will of *John McDonogh* conveys the title, or ownership of the property embraced by the legacies, to the residuary legatees, the cities of New Orleans and Baltimore. (*Eustris, C. J.*)
The State v. The Executors of John McDonogh, 171.
8. By the will the city of New Orleans is a residuary legatee under an universal title. (*Eustris, C. J.*) *Ibid.*
9. The legacy to the City belongs to the class known to the Civil Law, from the foundation of Christianity, by the name of legacies to pious uses. They are an element in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization. (*Eustris, C. J.*) *Ibid.*
10. Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies. (*Eustris, C. J.*) *Ibid.*
11. The term pious uses includes, not only the encouragement and support of pious and charitable institutions, but those in aid of education, and the advancement of science and the arts. (*Eustris, C. J.*) *Ibid.*
12. They are viewed with double favor by the law, on account of their motives for sacred usages, and their advantage to the public weal. (*Eustris, C. J.*) *Ibid.*
13. Article 1586 of the Code, which provides for the manner in which acceptances of donations for the benefit of a hospital for the poor of a community, or other establishment of public utility, shall be made, pre-supposes

DONATIONS AND TESTAMENTS, (*continued*).

- the legality of the donation, and there is no ground for any distinction between the right of holding by donation *inter vivos* and *mortis causa*. Nor does the law make any distinction between a legacy to the poor of a city and a legacy to a city for the poor: in both cases it is a legacy to pious uses, and the City is the recipient. (EUSTIS, C. J.) *Ibid.*
14. Under the Civil Law it is no objection to the validity of a legacy to pious uses that it is for the benefit of the poor, even without any designation of locality, and it has been held that a will was good in which a testator instituted *the poor* his heirs. (EUSTIS, C. J.) *Ibid.*
 15. The Article 1506 of the Code is not in the ordinary form of a prohibitive law. It is the first of the chapter which treats of dispositions *reprobated* by law in donations *inter vivos* and *mortis causa*. The expression *reprobated—reprochées*—by the law, implies something even more than prohibition. The terms are plain, general and comprehensive, excluding all exception—and are direct, positive, and unambiguous. The whole tenor, imperatively establishing the law, has for its object the exclusion of the legal existence of impossible conditions in testaments. (EUSTIS, C. J.) *Ibid.*
 16. The Article 1506 of the Code, which provides that impossible conditions, and those contrary to the laws, are reputed not written, is based upon considerations of public policy, and must be carried into effect, however it may conflict with the intention of the testator. (EUSTIS, C. J.) *Ibid.*
 17. The Article 1705, which provides that the intention of the testator must principally be endeavored to be ascertained, is a rule of interpretation only and subordinate to the Article 1506. (EUSTIS, C. J.) *Ibid.*
 18. The right of a man to dispose of his property after his death is derived, exclusively, from the law; and if the law says that, in certain cases, from motives of policy, the vain conceits of testators, *ineptæ voluntatis*, shall be held not written, it cannot be disregarded. (EUSTIS, C. J.) *Ibid.*
 19. The rules of interpretation found in the Code, belong to the doctrinal part of the law, and are not restrictive of the rules for the interpretation of contracts and testaments found in the body of the Civil Law; all are advice given to the Judge—landmarks they may be called—to be applied, not so much *ratione imperii*, as *imperio rationis*, and that while it is his duty not to lose sight of any of them, he must, in every case, exercise his discretion in applying them, ever bearing in mind that the least circumstance, at times, is sufficient to prevent their application. (ROSE, J.) *Ibid.*
 20. It is true that, in the construction of wills, Courts of Justice ought not to depart, without necessity, from the proper sense of the words used. That necessity seldom occurs in cases of single dispositions unconnected with others the will may contain. But when the several dispositions of the will are constituent parts of one scheme, each must receive the sense which results from the entire instrument; and the rule has, in that case, reference, not to the terms used in any one disposition, but to the entire

DONATIONS AND TESTAMENTS, (*continued*).

contents of the will. In such a case, if there is just reason to believe that the testator has used terms in a sense different from that sanctioned by usage, they must be taken in the sense in which it is believed he understood them. (Rost, J.) *Ibid.*

21. The intention of the testator must prevail over the grammatical meaning of the words which he has used, provided his intention is ascertained by dispositions contained, and words used in the will, and it is manifest that he had another object and another thought than that which the terms used in a particular disposition would otherwise convey. (Rost, J.) *Ibid.*
22. When the sense of a particular disposition, resulting from the entire instrument, has been ascertained, Courts may go further in cases of testaments than in cases of contracts, in disregarding the grammatical meaning of the words used, so far indeed as to supply words omitted, which may be done whenever the obvious meaning and the other parts of the will restore these words naturally. (Rost, J.) *Ibid.*
23. The intention of the testator to exclude his heirs at law, at all events, being admitted, the conclusion is inevitable, that if the Cities could not take the legacies, or violate the conditions which the testator had the right to impose, he intended to vest his property in the States of Louisiana and Maryland. (Rost, J.) *Ibid.*
24. The intention of the testator is clear—that if the bequest to the Cities did not take effect, or become forfeited by the violation on their part of the conditions, the States were to take it without conditions, as the next best thing he could do to insure the preservation of his fortune, and the application of it, in his name, to charitable uses. (Rost, J.) *Ibid.*
25. The intention of the testator, and the sense in which he used the word *lapse* being manifest, under the rule already cited, and the additional one "*in conditionibus testamentorum voluntatem potius quam verba considerare oportet*," that sense should be preferred though not the most correct and usual. (Rost, J.) *Ibid.*
26. That *McDonogh* did not intend, in the event the cities could not take the legacies, that the States should, coupled with the conditions—is apparent from his requesting the Legislatures of the States to carry his intentions into effect as far and in the manner which should appear to them most proper. (Rost, J.) *Ibid.*
27. Under the will the disposition in favor of the City of New Orleans is a bequest to pious uses. (Rost, J.) *Ibid.*
28. Under the Code the city of New Orleans can accept donations made to the poor, and take by will and by donation *inter vivos*. (Rost, J.) *Ibid.*
29. Cities can hold property patrimonially, and the property thus held may be applied by law to any object for which the city is bound to provide: and there is nothing contrary to public policy, or injurious to creditors, in the enforcement of a condition appended to a bequest, and without which the bequest would not have been made, that the property given

DONATIONS AND TESTAMENTS, (*continued*).

shall be applied to some of those objects and shall never be alienated. The giving, on such a condition, is a reasonable liberty to bestow, and the bequest, by providing a fund which the city was otherwise bound to supply, enriches it and increases its means to meet its obligations. (Rost, J.) *Ibid.*

80. If the legacy had been made directly to the poor, or the children of the poor, it would have come within the letter of the law; the City would have taken charge of it, and administered it for the beneficiaries. But this is not the only form such a disposition can assume, and the bequest as made, comes within the spirit and learning of our jurisprudence in the matter of charitable bequests. (Rost, J.) *Ibid.*
81. Donations to a city for pious uses, and for the erection of works of public utility, stand upon the same footing—and in either case the destination affixed to the property by the testator, follows it in the possession of the legatee, who is, notwithstanding, vested with the title. (Rost, J.) *Ibid.*
82. Uncertainty seems to be the essence of charitable bequests. Whenever the beneficiary is designated by name, he has a legal right which he can exercise, and his merit is alone to be considered—and the bequest ceases to have the peculiar merit of a charity. Under our law bequests for the poor, or for their benefit, are not void for uncertainty. (Rost, J.) *Ibid.*
83. If the disposition in the will was in favor of what is called in the will, the General Estate, it is invalid. If it establishes a legal and an equitable title in the technical sense of the English law, it is equally invalid. But if it vests in the City a title in full ownership, with a destination to charitable uses, for which the City would be otherwise bound to provide, it is lawful, and may be carried into effect. One of these positions must be taken. It is then impossible to evade or disregard the textual provisions of Article 1706 of the Code, which provides that a testamentary disposition must be understood in the sense in which it can have effect, rather than in that in which it can have none. (Rost, J.) *Ibid.*
84. When, under all the different interpretations of which a will is susceptible, it is lawful and may be executed, the construction should rest upon the words and arguments used by the testator. But where one interpretation will give effect to the will, and the other would not, the decision of the law supercedes the discretion of the Judge, and commands him to assume that the testator intended what was lawful. (Rost, J.) *Ibid.*
85. The condition in the will, not to alienate, is not unlawful in this particular case. A city may, in a case like this, be deprived of the *jus abutendi* over its property for an object of public utility, without its right of property being affected thereby; the Legislature having always the right to remedy the effects of the disposition, whenever the alienation of the property given becomes of public advantage. (Rost, J.) *Ibid.*
36. The distinction between this and *Henderson's* will (5th Annual) is obvious. *Henderson* made no disposition of his property in favor of any one, but simply provided that it should forever form part of his succession and be administered by his executors and commissioners to be named after them to the end of time—while *McDonogh* has made a valid disposition

DONATIONS AND TESTAMENTS, (*continued*).

- of his property, and the perpetuity of the bequest is merely the consequence of the perpetual existence of the legatee. (Rost, J.) *Ibid.*
37. Under the will of *McDonogh*, the cities of New Orleans and Baltimore are not invested with any title known to the laws of Louisiana. Under our system there can be no ownership stripped forever of the right of possession, use, administration and disposal. Such an estate has no warrant in our Code, nor precedent in our jurisprudence. (SLIDELL, J., dissenting.) *Ibid.*
38. The law, from wise motives, permits men to exercise a last act of volition over their estate by disposing of its ownership. But when they exercise this just privilege, they must exercise it under the law. They have no right to invent new tenures of property. (SLIDELL, J., dissenting.) *Ibid.*
39. The ownership is not given to the Cities. The language is not, I give and bequeath to the Cities—but I give and bequeath to the Cities to and for the several intents and purposes hereinafter mentioned. Those intents and purposes are fully expressed in subsequent clauses of the will. Being thus referred to, they must be considered as embodied in the devising clause, and clearly qualify and limit it. (SLIDELL, J., dissenting.) *Ibid.*
40. The intention of the testator to withhold from the Cities the *ownership* of his estate, in any sense of that term known to our law, admits of no doubt. It is interwoven with the whole theory of the will, and speaks unmistakably through its entire context. (SLIDELL, J., dissenting.) *Ibid.*
41. The real legatee intended and preferred by *McDonogh* was the Ideal Being which he designated as the General Estate. The Cities were intended to be the mere supervisors of the Perpetual Trust which he desired to create, and which, in its turn, was to be the source of the other trusts contemplated by the will. (SLIDELL J., dissenting.) *Ibid.*
42. The Ideal Being, contemplated by the will, has no legal existence, and is incapable of taking. And the State of Louisiana and Maryland, by ratifying the institution of the present suit, have clearly disapproved of the scheme of future incorporations contemplated by the will. (SLIDELL, J., dissenting.) *Ibid.*
43. It is apparent from the will that *McDonogh's* preference, in the disposition of his property, was for the extraordinary scheme which he had so elaborately prepared. He desired it to be carried out in its *entirety*, and forbade the Cities to violate *any* of its provisions. But still an apprehension existed in his mind that the scheme might fail, and from "whatsoever cause" this failure might arise, by "whatsoever means" it might come to pass, his desire was that the State of Louisiana and Maryland should then be the recipients of his fortune, who, by virtue of their sovereign power, could accomplish the substantial execution of such of his wishes as they might consider lawful, and to whose discretion and fidelity he was willing to leave their execution. The great object of the

DONATIONS AND TESTAMENTS, (*continued*).

testator was the education of the poor. The paramount object, with other wishes of the testator, so far as they may be deemed practicable and politic, the States can, and no doubt would, in good faith and with a just discretion, endeavor to accomplish; and thus the charitable desire of the testator would be disappointed only as to the preferred mode of its fulfillment, an alternative of his own choice being adopted. (SLIDELL, J., dissenting.) *Ibid.*

44. It is conceded that *McDonogh* intended to exclude his heirs at law from the inheritance of his property. But it is said that *McDonogh* did not dispose of the title and ownership of the estate. But this view is narrow and technical, and asks from an unprofessional mind the nice accuracy of an expert conveyancer. This is contrary to the received theory of the interpretation of wills. The law is indulgent to testators, who are regarded as *inopes consilii*. It exempts the phraseology of wills from technical restraint, and obeys the clear intention of the testator, however informal the language in which it may be announced. If that intention be even obscured by conflicting expressions, it seeks the intention, rather in a rational and consistent, than in an irrational and inconsistent purpose. Of two modes of construction it prefers that which will prevent a total intestacy. (SLIDELL, J., dissenting.) *Ibid.*

45. By the lapse of the legacies to the Cities, the testator meant their failure to take effect from any cause whatever. By the expression "said legacies wholly, or partially so lapsed shall enure, &c.;" he evidently meant the property embraced in those legacies. To say that under the clause in question he simply intended to place the States in the stead of the Cities—their action fettered by the same restrictions—their title qualified and limited by the same anomalous provisions as to possession, use and management is to obliterate from the clause its closing words, which commit to the States respectively a dominion controlled only by their own discretion. (SLIDELL, J., dissenting.) *Ibid.*

46. By article 1698 of the Code, "the testament falls by the birth of legitimate children of the testator posterior to its date," and it makes no difference if a child be born before or after the death of the testator.

Lewis v. Hare, 378.

47. The positive provisions of Article 1698 is in no manner affected by Article 1556, which provides that revocation of donations *inter vivos*, through the birth of children to the donor, operate only up to the disposable portion. *Ibid.*

48. Action to annul a nuncupative will by public act. It was proved that one of the three witnesses to the will was not present when it was written by the notary. *Held*: The will was null and void.

Alloway v. Babineau, 469.

ESTOPPEL.

1. Where after a judgment obtained by the wife against the husband, for a specific amount, a public act has been made, signed by the husband and wife, fixing the sum due her for dotal and paraphernal rights at that established by the judgment—such public act is an estoppel to the wife's

ESTOPPEL, (continued).

claiming from the husband, as against his creditors, a larger amount. Third persons have a right on the faith of the public act, in connection with the judgment, to consider themselves secure in purchasing property of the husband free from all claim on the part of the wife, except for the balance which, by the act, appeared to be due her.

Judice v. Kerr, 461.

EVIDENCE.

1. Parole evidence is inadmissible to prove either the sale of a slave, or acknowledgments tending to shew the ratification of an unauthorized sale of a slave. *Hudnall v. Watt & De Saulles*, 5.
2. Plaintiffs offered in evidence an instrument purporting to be a will of their father, made before a notary public and three witnesses, for the sole purpose of showing an acknowledgment therein by the testator that the plaintiffs were his natural children. *Held*: That the will was admissible for the purpose for which it was offered, although never probated. *Remy v. Municipality No. Two*, 27.
3. Plaintiffs offered in evidence a transcript of the proceedings of the Second District Court of New Orleans, putting the plaintiffs in possession as heirs of their father. *Held*: That the document was admissible to prove *rem ipsam*. *Ibid*.
4. Parole evidence is inadmissible to show the declarations of a surety, made at the time of his signing the note, but out of the presence of his co-surety—the object of which evidence was to show what the surety supposed was the nature of his obligation. *Gossierand v. Lacour*, 75.
5. When a sale is made in writing, which contains no receipt for the price, nor acknowledgment of payment—the presumption will be that the money was not paid. *Kennedy v. Beaseley*, 88.
6. Under the Spanish Government verbal sales of lands might perhaps be shown, but only in the case of actual and continued possession by the purchaser. *Riddle v. Ratliffe*, 106.
7. The improper reception of parole evidence offered by the State, of the contents of a policy of insurance, is cured by the subsequent introduction of the policy by the defendant. *State v. Cazeau*, 109.
8. Where heirs have been recognized as such and put in possession of the succession afterwards, and obtained a judgment on the final account rendered by the Curator—it is sufficient evidence of their capacity as such to authorize a judgment against the Curator's surety. The burthen of proof will rest on the other party. *Heirs of Maguire v. Bass*, 270.
9. Where the return of an execution against the surety of a defaulting curator shows that the case was "settled by the parties," the creditors, in the absence of further explanation, have a right to consider the amount of the execution as having been paid in cash. *Gates v. Walker*, 277.
10. The evidence of one witness is sufficient to prove payment of a pre-existing obligation, even exceeding five hundred dollars: the rule of evidence contained in article 2257 of the Civil Code, being applicable to the proof of contracts, not to the proof of the extinction of contracts. *O'Bryan v. Flynn*, 307.

EVIDENCE, (*continued*).

11. When an act *sous seing privé* is permitted to be read in evidence, without objection, proof of its execution is waived. *Tyler v. Marcellin*, 312.
12. The declarations of a wife are not admissible in evidence against the husband. *Dubois v. Ferrand*, 373.
13. In an attempt to make the admission of the wife evidence for the husband, on the ground that she acted as his agent, it is essential to show not only the agency, but that the admission itself appeared closely and intimately connected with the subject matter of the agency. The mere fact of a note having been executed in favor of the wife, does not, *per se*, create the presumption that she acted as the agent of her husband. If she acted as his agent in making a settlement for him, in which the note in question was given, that fact should have been shown. *Ibid.*
14. Action on a written contract, leasing "the ground floor of the brick building on the corner of Lafayette and New Levee streets," &c. The answer set up, that all the premises leased were not delivered. Parole evidence was admitted "of the acts and declarations of the defendant showing that the apartment occupied by him was only part of the ground floor to which he was entitled under the contract, according to the understanding of the parties." To the admission of this evidence a Bill of Exceptions was taken. *By the Court*: The objection to the admissibility of the evidence is not tenable. The Code of Practice, art. 329, provides: "when the defendant in his answer alleges, on his part, new facts, these shall be considered as denied by the plaintiff—therefore, neither replication nor rejoinder shall be admitted." Under this provision it was perfectly competent for the plaintiff to show in what manner the delivery of the property had been effected, particularly as the defendant had put the matter at issue by his answer. *Corbett v. Costello*, 427.
15. Parties cannot be controlled as to the order in which they choose to introduce their evidence. *Succession of Barr*, 458.
16. Plaintiff charged an indebtedness on the part of defendant for advances, as would appear by vouchers, from No. 1 to 12, that would be produced on the trial. On the trial a contract was offered in evidence, to the admission of which a bill of exceptions was taken. *Held*: the evidence was properly admitted. The defendant might have craved oyer of the vouchers, of which the contract was one—and having filed his answer without doing so, the presumption is, he knew what they were. *Dunlap v. Brette*, 479.
17. Under the Code of Practice and laws of this State, there is no other mode of compelling a party to a suit to give evidence than that by interrogatories on facts and articles. *Billedau v. Keller*, 487.
18. Defendant's counsel having objected to an affidavit made by the deceased for the arrest of the prisoner, as evidence of a dying declaration—parol proof was offered and admitted, that when the deceased made his declarations to the magistrate, he considered himself in a dying state—to which evidence a bill of exceptions was taken. *By the Court*: After the defendant had himself objected to these declarations, reduced to

EVIDENCE, (*continued*).

writing in the form of an affidavit for his arrest—he could not with any propriety turn round and object to evidence being given by parol of what the deceased did declare before the magistrate.

State v. Viaux 574.

Signature of Drawer—See Bills of Exchange—*Whitney v. Dunnell*, 439.

See Courts—*Rhea v. Taylor*, 28

FIERI FACIAS.

1. Under a *fi. fa.* from the Circuit Court of the United States, in a suit against *David Stanborough*, the Marshall, without any permission from the District Judge, went into the Clerk's office in the District Court of the Parish of Madison, in which were certain suits pending, entitled *J. Stanborough v. D. McCall*, and seized the notes sued on, and also made what he terms in his return, a seizure of the judgment, or decrees of seizure and sale, and gave notice of seizure to the Clerk of the Court and to the Curator, *D. Stanborough*, but none to *McCall*, the debtor. *Stockton* afterwards bought these notes at the sale made by the Marshall. *Held*: that the proceedings of the Marshall were a gross and unprecedented disturbance of the Clerk in the performance of his official duties as custodian of the records of the Court and conferred no title upon *Stockton*, at whose instigation, it seems, they were had. The Marshall had no right to take the notes without a previous order from the District Court, in whose custody they were; and the acts done by the Marshall were insufficient to effect a seizure and form the basis of a sale.

Stanborough v. McCall, 9.

GARNISHEE.

See Attachment—*Featherston v. Compton* 285.

HUSBAND AND WIFE.

1. No separation of husband and wife can be decreed for cause of abandonment without a compliance with Article 143 of the Code.
Perkins, Jr., v. Potts, his Wife, 14.
2. The law presupposes the possibility of a reconciliation between husband and wife, and its policy is to bring them together again. *Ibid.*
3. Vague and general allegations cannot support a petition in an ordinary civil suit. The cause of action—the object of the demand and the nature of the title, must be stated with such certainty as to apprise the defendant of every circumstance necessary to put him on his just defence, and to bar a subsequent investigation of matters once decided. A party can be permitted to derive no advantage from the obscurity, or generality of his allegations; and sound policy requires that there should be no relaxation of these rules, especially in proceedings of this kind, which involve the fate of individuals, and the most important interests of society. *Ibid.*
4. A married woman is liable in damages to the injured party for any offence (*délit*) committed by her, and she is not relieved from liability by the fact of her husband's presence, or concurrence.

Brown v. Crockett, 30.

HUSBAND AND WIFE, (*continued*).

5. Property purchased with the paraphernal funds of the wife is her separate property—and not liable for the debts of the community.
Metcalf v. Clark, 286.
 6. It is not necessary that an investment of paraphernal funds in the name of the wife should appear, as such, in the act by which the property is acquired. The wife, in all cases, would be bound to show the reality of the sale to her *dehors* the act—and the same proof would be necessary in order to make the acknowledgment in the act binding upon her.
Ibid.
 7. The insolvency of the husband will not prevent a conveyance of property by him to his wife for the purpose of replacing her dotal and paraphernal effects, alienated during the marriage.
Judice v. Neda, 484.
 8. Property conveyed to the husband, in lieu of a sum of money inherited by the wife, is paraphernal.
Gravenberg v. Savoie, 499.
 9. A married woman cannot, by surrendering to her husband the partial or entire administration of her paraphernal property, exonerate herself from liability for debts incurred for her individual use, or for the purpose of rendering that property productive.
Patterson v. Frazer, 512.
- See Community.
See Estoppel—*Judice v. Kerr*, 461.
See Res Judicata—*Judice v. Kerr* 461.

INJUNCTION.

1. Matters available in the defence of a suit will not authorize an injunction.
Megget v. Lynch, 6.
2. On the dissolution of an injunction staying the execution of a judgment bearing 8 per cent., 20 per cent. damages may be allowed. But a further allowance of 8 per cent. interest would be giving 16 per cent. interest, which is illegal.
Woods v. Wylie & Egan, 18.
3. A judgment was obtained by *Walsh* against *Leblanc* for the price of a slave—conditioned that no execution should issue until *Walsh* had furnished personal or mortgage security to protect *Leblanc* from disturbance or eviction. *Walsh* executed a mortgage, and sent a sheriff with a copy of the mortgage and a *fi. fa.* to *Leblanc*. *Leblanc* enjoined the writ—and the main ground was that no formal notice of the mortgage had been given before the writ issued. *Held*: the mere issuing of the writ worked no injury to *Leblanc*. Before any attempt was made to execute it, he had notice of the execution of the mortgage, and refused to accept it, not on the ground of an informal tender, but that the mortgaged property was insufficient. It seems inequitable to allow the plaintiff to enjoin upon this mere objection of form, which he did not make at the time. He might, it is true, have reasonably objected to pay the costs of issuing the *feri facias*—but ought to have been satisfied with the mortgage, and paid the debt.
Leblanc v. Walsh, 67.
4. When the judgment enjoins bears ten per cent. interest, no more interest can be allowed on the dissolution of the injunction.
Hood v. Knox, 73.

INJUNCTION, (*continued*).

5. Upon the dissolution of an injunction, which arrests the execution of a judgment, the judgment creditor is only entitled to interest to the date of the dissolution. *Amis v. Bank of Kentucky*, 441.
6. Matter which may be pleaded to the merits, cannot be made grounds for an injunction. *Lafleur v. Mouton*, 489.
7. An injunction will not be dismissed when it appears that the party will be immediately entitled to the same remedy. *Ibid.*

See Appeal—*Pellerin v. Levols*, 496.

INSURANCE.

1. As a general rule, the warranty of seaworthiness during the whole voyage is the same, whether the insurance be on the ship, or on goods, and the underwriters are not bound to pay any loss resulting from that cause after the commencement of the voyage. *Lapene & Ferre v. Sun Mutual Insurance Co.*, 1.
2. If there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. *Ibid.*

INSOLVENT AND INSOLVENT PROCEEDINGS.

1. The only formality required by law to make absent creditors parties in cases of voluntary surrender under the Acts of 1817, is the appointment of Counsel to represent the absent creditors. *Northern Bank of Kentucky v. Squires*, 318.
2. It is well settled that State insolvent laws, discharging the obligation of future contracts, are constitutional. (SLIDELL, C. J.) *Ibid.*
3. All the creditors of an insolvent, privileged as well as ordinary, should be made parties to the tableau, and accordingly notified. In a *concurso*, all the creditors of the insolvent are considered as plaintiffs and defendants, and their respective claims, whether privileged, mortgage or ordinary, must be settled contradictorily on a tableau of distribution. A separate tableau among a particular class of creditors cannot be viewed but as irregular, and not sanctioned by law. *Peter Conrey v. His Creditors*, 371.

JUDGMENT.

1. In an attachment suit, if the judgment does not decree that the plaintiff shall be paid by privilege out of the proceeds of the property attached, it will be regarded as an ordinary judgment. *Succession of Caldwell*, 43.
2. A judgment obtained against one who, though cited, dies before issue joined, is a nullity. *New Orleans & Car. R. Road v. Liles*, 80.

LEASE.

1. Blois leased a warehouse from plaintiff, in which were certain goods bought by him. He transferred these goods to his vendor in part payment of the price, who sold them to other parties. Plaintiff sequestered the goods, and claimed upon them the lessors privilege. *Held*: that, as the transfer by the lessee, and subsequent sale by his vendor, took place before there was any default by the tenant to pay his rent, and before any action taken by the landlord, the lessor had no privilege.
Smith v. Blois, 10.
2. The lessor may enforce his privilege on the furniture in the leased premises—though the lessee reside in another parish.
Heirs of Lalaurie v. Woods, 866.
3. The failure of the lessee to pay the rent authorizes the lessor to swear that he has good reason to apprehend that the property will be removed from the premises leased. *Ibid.*
4. The landlord loses his privilege by permitting fifteen days to elapse after the removal of the goods, without taking action to secure this privilege.
Farnet et al v. Their Creditors, 872.
5. It is impossible to give to an amicable arrangement by an insolvent with a part of his creditors, without a formal assignment and a formal possession, the effect of a *cessio bonorum*, by which the rights of creditors are fixed at the date of the surrender. *Therefore*, the landlord's privilege is not preserved by such an amicable arrangement, fifteen days having elapsed after the removal of the goods. *Ibid.*
6. The failure of a tenant to pay the rent, authorizes the landlord to make affidavit that he has good reason to fear the property may be removed from the premises leased. *Wallace v. Smith*, 374.
7. The landlord has a lien on goods on storage to the amount of storage due. *Ibid.*
8. The Act of 21st March, 1850, which gives the landlord a summary process for the expulsion of a tenant, is not in violation of Articles 118 and 119 of the Constitution of 1845. *Wallace v. Smith*, 376.
9. Proceedings under this statute are summary, and are tried without a jury. *Ibid.*
10. It is only after the lessor has been called on, and his refusal or neglect to make repairs, that the lessee has authority to make them, and if, before such call, the repairs are negligently made by an *employé* of the lessee, the lessee is liable for damages. C. C. 2663, 2664.
Caldwell v. Snow, 392.
11. Where a contract of lease expressly excludes the right of sub-leasing, the premises cannot be leased without the consent of the lessor.
Prieur v. Depouilly et al, 399.
12. It is not necessary that the lessor should take any notice of the contract of sub-lease, or seek to interfere with it any further than it interferes with his rights. *Ibid.*
13. Article 2696 of the Code, prohibiting the lessee to sub-lease, is to be construed against the lessee. *Ibid.*

LEASE, (*continued*).

13. Where the lessee sub-leases, without the lessor's consent, such sub-lease does not affect the lessor's right against his immediate lessee, and the lessor cannot be compelled to resort to an action to rescind the lease, and may exercise his privilege on the property in the leased premises.

Ibid.

Damages allowed for provisional seizure.
See Damages—*Fleetwood v. Dwight*, 491.

LESION.

1. The purchaser is not entitled to a diminution of the price where the deficiency in the land does not exceed one-twentieth of the tract sold.
Woodward v. Ledoux, 85.
2. The right to rescind a sale for lesion beyond moiety, is the only restraint upon the liberty of the citizen to bind himself and his property according to the dictates of his own judgment: and the evidence relied on to establish lesion should be peculiarly strong and conclusive.

Demaret v. Hawkins, 483.

LEVEES.

1. A front proprietor on the river cannot be held bound to make reparation for the consequences of an accident, unless he was in fault when it occurred.
Watson v. Ledoux, 68.
2. The Act of 1829, relative to Roads and Levees, so far as the parish of Pointe Coupée is concerned, was repealed by the Act of 8th February, 1831.

Ibid.

LIS PENDENS.

1. T. sued his wife for a separation from bed and board, and in the same action sought to have annulled certain notes which he alleged had been given by him to her without consideration. He made B., who held the notes, a party, and charged that B. had notice that the notes were given without consideration. Subsequently B. sued T. on the notes, and T. pleaded *lis pendens*. *Held*: That the plea was good.

Bischoff v. Theurer, 15.

LITIGIOUS RIGHTS.

For sale of—See Sale—*McCarty v. Spiane*, 482.

MANDAMUS.

1. No mandamus will be issued when the applicant has an adequate remedy by appeal. *State v. The Judge of the Fourth District Court*, 92.
2. The supervisory power of the Supreme Court, through writs of mandamus, is limited to those cases where its exercise is incidental to and in furtherance of its appellate jurisdiction.

State v. The Judge of the Fourth District Court, 288.

MANDATE.

1. Where the agent contracts for a foreign principal, the credit is presumed to be given to him.

Thorne v. Tait, 8.

See Surety—*Sattenberry v. Loucks*, 95.

MARRIED WOMEN.

Liability of, for offences, (*delicto*)—See Husband & Wife—*Brown v. Crockett*, 80.

MINORS.

1. F., the tutor of a minor, purchased, at a judicial sale, a slave belonging to the minor, and the widow in community. The widow approved of the purchase. Afterwards F. was removed from the tutorship, his account homologated—and R., being appointed in his stead, was authorized by the Court to receive the price of the sale. *Held*:—This judgment was, by implication, a judicial approval of the sale, and the Probate Court was competent to sanction it. It may well have been considered by the Probate Judge advantageous for the minors that their new tutor should take the value of the slave in money, rather than bring suit against F. to rescind the sale. *Colomb v. Jones* 442.
2. It seems, from the phraseology of Article 2139 of the Civil Code, that a minor injured by a violation of its provisions, or his tutor under judicial sanction, may waive the penalty which it establishes, and claim indemnity for the loss. *Ibid.*
3. A minor, who is a married woman, is not incapacitated by Article 374 of the Code from incurring debt beyond the amount of one year's revenue, for her individual use, or for the benefit of her paraphernal property.

Patterson v. Fraser, 512.

Mortgage of Minors—See Mortgage—*Mercier v. Canonge*, 87.

See Parent and Child—*Lea v. Richardson*, 94.

MORTGAGE.

1. It is true, that by the Code, the property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it. But an interpretation of this provision, independent of other principles of our laws and jurisprudence, is inadmissible. *Mercier v. Canonge*, 87.
2. Ordinary mortgages are required to be created by the formal written consent of the parties, for specific sums, and to be inscribed upon the public records. But the tacit mortgage operates secretly, and by a legal fiction. It is in derogation of common right. It should, therefore, be strictly construed. The propriety of such strict construction is aided by the consideration that the system of tacit mortgages is one which tends to impair public confidence, and check that free circulation of property which is so conducive to the general prosperity. *Ibid.*
3. As against innocent third persons, purchasers, or mortgagees for a valuable consideration, the language of the Code may be properly interpreted as applying to the ostensible property of the tutor, and as not extending to that in which he has only a covert, equitable interest. *Ibid.*
4. The law treats minors as a privileged class in certain respects; but its protection is not to be strained to the detriment of the great mass of society, or to the sacrifice of that well-settled rule which regards with favor the rights of an innocent purchaser, and refuses to affect him by a secret equity. *Ibid.*

MORTGAGE, (*Continued*).

5. There is nothing in the Code to limit the minor's tacit mortgage to the property which stands upon the public records in the name of the tutor. The Article of the Code is general in its terms, and embraces all the property—*tous les biens*—which can be shewn to belong to the tutor.—(Rost, J., dissenting.) *Ibid.*
6. The tutor has himself acknowledged that he placed the property in the name of his sister, to keep it from the minor's mortgage. He could not do indirectly, what he could not have done directly. (Rost, J.) *Ibid.*
7. The effect of the pact *de non alienando*, so far as the party in whose favor it operates is concerned, is, that in contemplation of law, the property remains in the possession of the original debtor, notwithstanding it may have been alienated by him; and those who purchase it, or acquire real rights on it, are presumed to know the titles and incumbrances under which they hold. *Guesnard v. Soulie*, 58.
8. The mortgagee, in such a case, has a right to proceed by the *via executiva*, after the alienation, as if the property still belonged to the mortgagor. *Ibid.*
9. A purchaser at sheriff's sale can compel the recorder to erase from his books of record a judicial mortgage, the registry of which is posterior in date to that of the mortgage under which the property was sold, so far as the same bears upon the property purchased. *Stewart v. Allain*, 64.
10. The purchaser of property, under a probate sale, who assumes the payment of a mortgage resting upon the property, cannot urge that the sale canceled the mortgage; nor are such purchasers third possessors, in the sense which would require the holder of the mortgage claim to pursue his rights under the hypothecary form of action. *Hebert v. Doussan*, 267.
11. The decision in *Alexander v. Jacobs*, 5 M. 632, was made before the adoption of the Code of Practice, and is not law now. The Code of Practice (arts. 68, 69,) not only defines the hypothecary action, but declares under what circumstances it may be enforced, and no where is it laid down that when mortgaged property has been seized and sold, the mortgagee, before proceeding against the third possessor, must first bring suit against the seizing creditor to obtain payment out of the proceeds of the object he has sold. *Gomez v. Courcelle*, 304.
12. It is not necessary before proceeding against the third possessor of mortgaged property, for the hypothecary creditor to show that a *fi. fa.* has been sued out against the debtor and a return of *nulla bona* made. *Ibid.*
13. The law accords priority to the oldest mortgage, and a sale under a younger tacit mortgage does not defeat the older. The property affected passes *cum onere*, and the vendee receives it burthened with its prior incumbrance. *Ibid.*
14. Plaintiffs bought at sheriff's sale a plantation and slaves, on the 7th Jan., 1843. The Recorder certified that a mortgage, inscribed 13th October, 1848, existed on the property. Plaintiffs sued the Recorder to compel

MORTGAGE, (*Continued*).

him to erase the mortgage so far as their property was concerned—and obtained judgment. *By the Court*—The judgment appears to us perfectly in conformity to the rights of the parties.

Chauvin v. Chaiz, 397.

15. A creditor with a tacit mortgage is not bound to follow the proceeds of the sale of the property in the hands of the Sheriff, and enjoin him from paying them over: he may pursue the property itself.

Judice v. Kerr, 461.

16. The rule is without exception that the mortgage falls with the principal obligation to which it is accessory.

LeBeau v. Glaze, 474.

17. In judicial sales the amount of mortgages not due, enure to the benefit of defendant in execution.

Demaret v. Hawkins, 483.

18. It is not necessary to re-inscribe a mortgage, where the property has been sold at a succession sale and the proceeds reduced to possession.

Succession of Dejean, 505.

19. The transfer and possession of a mortgage note will enable the transferee to obtain an order of seizure and sale—though the public act of transfer shows no acceptance by the transferee.

Bacon v. Maskell, 507.

20. Where the vendor has bound himself to raise certain mortgages on the property sold, he will not be entitled to an order of seizure and sale, unless he can show by authentic act that he has done so. *Ibid*.

Whether mortgages which executor is bound to raise to sell property, &c, should be re-inscribed. See *Fontenet v. Debaillon*, 509.

See Practice—*Robotham v. Tate*, 78.

NEW ORLEANS.

1. Under the successive constitutions of Louisiana, the city of New Orleans and its officers have been made permanent functionaries of government for all purposes of police and good order, and for the punishment of minor crimes and offences. The police and good order of a city include the education of youth, and the care of the poor within its limits. (Rost, J.)

State v. Executors of McDonogh, 171

2. The 35th section of the Act of 23d February, 1852, provides a summary mode of proceeding by the city of New Orleans against defaulting tax payers—and substitutes a constructive notice by advertisement, in place of personal citation. This, being in derogation of common right, must receive a strict construction, and will not, therefore, be applied to the collection of taxes assessed before the passage of the Act.

City of New Orleans v. Cochrane, 365.

3. Under the Act of 1832, providing for the opening of streets in New Orleans, there must be published in the newspapers a notice of the day on which the Commissioners will present to the Court their estimate and assessment for confirmation. A certificate of the Clerk of the Court is not evidence of such publication. It must be proved, under oath, as other facts are proved.

Municipality praying for the opening of Orleans Avenue, 377.

OBLIGATIONS.

1. A promise to pay a sum of money to a wife, for a wound, inflicted by the party promising, on her husband—whether or not death ensued—is binding.
Beckley v. Clark, 8.
2. In 1849, a crevasse occurred on defendant's land. Plaintiffs, who lived above and below the land, contracted with James Flemming to have the crevasse stopped, and brought this action to recover the price from the defendants, on whose land the crevasse was. *Held*: That the defendants cannot be held liable for the amount claimed, unless there was an express or implied assent on their part to pay. The crevasse was the result of overpowering force—the act of God, which does nobody harm.
Lepretre v. General Council, 22.
3. In cases of flood, as in those of conflagration, the rule is, that services rendered voluntarily to preserve another man's property from destruction, are presumed to be gratuitous.
Watson v. Ledoux, 68.
4. A promise to the creditor to pay the debt of another is binding, and requires no consideration, or foundation, but the original debt.
New Orleans and Carrollton Railroad v. Chapman, 97.
5. The Stockholders of the Clinton and Port Hudson Railroad Company are, in no legal sense, joint debtors of the Corporation. The obligations of each are several, and entirely unconnected with those of the other stockholders.
Haynes v. Kent, 132.
6. The Company was organized on the mutual principal, its sole capital consisting in the premiums paid by those who insured with the Company; and the notes for premiums constituted a reserved fund for the payment of losses, which the Directors, under their charter, had no authority to divert from the payment of the losses to which they were specially affected.
Levy v. The Mutual Benefit Life and Fire Insurance Company, 380.
7. An executor may bind himself individually for a debt of the succession; and where the promise is made to pay the debt at a specified time, it is not merely an acknowledgment of the debt, but is a contract which may be enforced against him individually, although the promise be made by him in an instrument in which he describes himself as executor.
Winthrop v. Jarvis, 434.
8. It is against public policy to permit a person to stipulate for a partial immunity for the commission of a future immoral act.
Hays v. Hays, 468.

OFFICE AND OFFICER.

See Surety—*Saltonberry v. Loucks*, 95.

OWNERSHIP.

See Servitude—*Parish v. Municipality*, 145.

PARENT AND CHILD.

1. Though the mother be excluded from the tutorship of her minor children by contracting a second marriage, she does not thereby forfeit her maternal power; but still retains, paramount to the tutor, the right of rearing and educating them. *Lea v. Richardson*, 94.

PARTNERSHIP.

1. Plaintiff and Defendant formed a commercial partnership. Plaintiff was to furnish the entire capital, upon which he was to receive six per cent interest and two-thirds of the profits. Defendant was to receive sixty dollars per month for his expenses and one-third of the profits. Plaintiff did not furnish the stipulated capital—and for want of sufficient means the partnership was dissolved with a loss equal to the whole amount of capital furnished. *Held*: Defendant was not liable for any portion of the loss, and was entitled to his sixty dollars per month. Both parties seek to avoid a loss, and it should be borne by him who was most in fault. *Bonis v. Louvrier*, 4.

PLEADING.

1. Parties cannot be permitted to derive any advantage from vague and uncertain allegations, when they relate to matters defined in written instruments. The cause of action, the object of the demand, and the nature of the title, must be stated with such certainty as to apprise the defendant of every fact necessary to put him on his just defence. (*EUSTIS, C. J.*) *Parish v. Municipality*, 145.
2. On an exception that the petition discloses no cause of action, all the facts alleged must be taken as true, provided they are possible, but their legal consequence is presumed to be denied. *Ibid.*
3. Where an amended petition, which changed materially the action, was never served on the defendant, and its allegations never put at issue—it will not be considered as constituting any part of the pleadings. *Levy v. Weber*, 439.

See Bills and Notes—*Beebe v. McNeil*, 180.

See Husband and Wife—*Perkins v. His Wife*, 14.

PRACTICE.

1. A slave was inventoried as the property of the succession of Mielke. The curator of the succession took a rule on the slave, and on Hutchinson, who held the slave in possession, to test the condition of the person claimed as a slave, and the right of possession of Hutchinson. Hutchinson excepted to the proceeding by rule. *Held*: that there is no warrant in the law for the mode of proceeding adopted by plaintiff. His remedy is by an action. *Succession of Mielke*, 11.
2. Writ of seizure and sale of property situated in East Feliciana, mortgaged by defendant, who subsequently removed to West Baton Rouge, was issued, and personal service was made by the Sheriff of East Feliciana on the defendant in E. F. *Held*: That the service was sufficient. *Rhea v. Taylor*, 23.
3. The personal service on the defendant in East Feliciana rendered unnecessary a service in West Baton Rouge. Defendant being personally served

PRACTICE, (*Continued*).

by a competent officer, within the parochial limits of that officer's functions, could not plead ignorance of the seizure of his property, or that the mortgage debt was demanded of him. *Ibid.*

4. On a previous trial, this case was remanded because the Court had erred in admitting in evidence a commission taken by a magistrate of the State of Texas, whose official capacity was not properly certified. Subsequently the commissions and documents were withdrawn, and a new certificate as to the magistrates capacity, in proper form, was obtained and appended. *Held*: That for all the purposes of this inquiry, the commission and documents might be considered as not having been removed. *Barelli & Co. v. Lytle & Huntington*, 28.

5. After answer filed, it is too late to compel plaintiff, who sues on an account, to file a detailed bill. *Chapman & Goodloe v. Hart*, 35.

6. It may be true, under the strict rules of pleading at Common Law, that a plaintiff is bound to affirm his contract by bringing his action for damages for the non-performance of it, or disaffirm the agreement *ab initio*, and bring his action for money had and received to his use. Under our practice, if defendants do not except and force the plaintiff to make an election, it is too late after evidence has been taken and trial had, to raise an objection of this character. *Mackoy v. Holton*, 48.

7. Where issue has not been joined before the death of the original plaintiff, no judgment can be had before notice to the defendant of the revival of the suit. *Hiriat v. Hildreth*, 54.

8. An action for the recovery of land will not bar the plaintiff from suing out an injunction against defendant's committing waste, nor deprive him of his right to sequester timber cut from the land. *Bogart v. Rile*, 55.

9. When all the parties interested in the judgment have not been made parties to the appeal, the appeal will be dismissed. *Succession of Ira Smith*, 57.

10. When, by the act of the defendant and the acquiescence of the plaintiff, an action of boundary is changed into a petitory action—the defendant in the original suit becomes the plaintiff in the petitory action. *Blanc v. Cousin*, 71.

11. Since the adoption of the Code of Practice, a judgment against the original debtor is no longer necessary to support an action of mortgage, even when the *via executiva* is resorted to. The only requisite in such case is an amicable demand from the debtor, or his heirs, thirty days before filing the petition. *Robatham v. Tete*, 73.

12. The remedy of parties to a judgment alleging matters *in pais*, against one not a party to the record, is by an action in the ordinary form, and not by rule; therefore, proceedings against the heirs by a judgment creditor of their deceased father, to make them liable for their father's debts because they had taken possession of his succession, and made an informal distribution of it among themselves, must be by an ordinary action, and not by rule. *New Orleans and Carrollton Railroad v. Bosworth*, 80.

PRACTICE, (*Continued*).

13. In a suit on an obligation by private writing, the plaintiff is not required to prove defendant's signature, unless it be expressly denied: and if a judgment by default be taken, it is, in legal intendment, a joining of issue without a denial of the signature. *Davis v. Davis*, 91.
14. When plaintiff prayed, in an amended petition, that defendant might be ordered to declare, on oath in open Court, on a day to be fixed, whether a certain account was not correct—a judgment by default cannot be confirmed on the day after the filing of such petition, without any day having been fixed for defendant to answer, and without answer to the interrogatories. *Ibid.*
15. Plaintiff made opposition to the sale of two slaves, seized by *Lewis*, Sheriff, in the suit of the *Union Bank v. Hereford*, in the District Court of East Baton Rouge, in which Court he claimed damages against the defendants, alleging the slaves to be his property. Defendants excepted to the jurisdiction, on the ground that their domicile was in New Orleans.
By the Court: The plaintiff's claiming title to the slaves seized, the opposition was properly made by petition to the Court from which the order issued, as required by Article 398 of the Code of Practice; and Article 400 of the same Code expressly provides, that if the sale has not been enjoined, the opposition shall not prevent the Sheriff from selling the property under seizure, but in such case he shall be personally responsible for all damages which the sale may occasion the intervening party, and the Sheriff shall have his recourse against the party who has obtained the seizure. *Lobdell v. The Union Bank*, 117.
16. The revocatory action cannot be exercised by individual creditors until their debts are liquidated by a judgment, unless the defendant in such action be made party to the suit for liquidating the debt brought against the original debtor. Code, 1967. *Bach v. Leopold*, 386.
17. As a general rule, it is more than questionable whether the Court, in an action of this kind, can disregard the usces, and give a judgment for the nominal plaintiff. But in the present case, public policy, no less than legal principle, and the peculiar facts disclosed in evidence, preclude us from allowing the usces to disappear, and to substitute another actor in their place. *United States, for the use, &c., v. Union Bank*, 389.
18. The use of the name of the Government, with all its privileges and prerogatives, in the prosecution of individuals, must be discountenanced by this Court. *Ibid.*
19. In suits instituted by plaintiffs against one *Weber*, an attachment was levied on a lot and buildings in possession of defendants. Defendants intervened, and claimed the property, by purchase, from *Weber*. Plaintiffs answered that the sale to defendants was fraudulent and simulated. Judgment was rendered in favor of plaintiffs for the amount of their claims, "with privilege on the property attached." Execution was issued, and from the Sheriff's return it appeared that the property attached was adjudicated to the plaintiffs. Defendants refused to give up the property, and this action was brought for property.

PRACTICE, (*Continued*).

By the Court: It does not appear that either of the defendants was ever notified of the sale, and as the plaintiffs allege, they have continued to occupy the premises since the sale. It must be conceded that the proceedings in those suits were exceedingly loose and irregular. There is nothing in the record which shows that the claim of the intervenor was adjudicated upon, or that it was abandoned; neither does it appear that the intervenor had any knowledge of the judgment rendered against her vendor, recognizing the attaching creditor's privilege on the property. In the absence of such proof, and in view of all circumstances disclosed by the record, it is clear that the rights of the intervenor must stand unaffected. So thought the District Judge, for his judgment was chiefly based on the ground that the plaintiffs were bound to resort to the revocatory action.

Levy v. Weber, 439.

19. It is not necessary, under the provisions of the Act of 1852, chap. 305, that a judgment by default should precede a judgment homologating an administrator's account, rendered by the Clerk of the District Court.

Succession of Gautier, 451.

20. Art. 620, C. P., which requires the decree of the Supreme Court, to be recorded on motion *in open Court*, is repealed by the act of 1862, entitled "An act relative to the power of Clerks of District Courts, the parishes of Orleans and Jefferson excepted;" which confers upon the Clerks of District Courts, power "to receive, file and record all mandates and decrees rendered by the Supreme Court in causes taken up by appeal from their respective Courts, and to issue all legal process under such mandates and decrees of the Supreme Court."

Maskell v. Haileigh, 457.

21. Plea of prescription having been filed in the Supreme Court, the case was remanded to enable plaintiff, if possible, to show an interruption.

Bank of Louisiana v. Richard, 458.

22. A wife, by the hypothecary action, sought to make property, which had been bought at a sale provoked by a creditor of the husband, liable for her claim. *By the Court:* Under Article 711 of the Code of Practice, such a privity exists between the purchaser and the suing creditor, that the purchaser may call on the suing creditor to appear in the suit and defend him, or directly avail himself of any legal or equitable defence by which the suing creditor might himself oppose the hypothecary action.

Judice v. Kerr, 401.

23. On the filing of a final tableau by an Administrator making distribution among the heirs—the Administrator, having asked for citation for the heirs, cannot be forced to trial before they have been made parties.

Broussard v. Robin, 478.

24. Cause remanded because continuance should have been granted.

Neyland v. Neyland, 465.

25. The validity of a judgment for want of citation, cannot be attacked in the Supreme Court when it was not made a ground of action in the Court below.

Barret v. Emerson, 503.

PRACTICE, (*Continued*).

26. When, after prayer for trial by jury, the parties proceed to trial without a jury, and no bill of exceptions is taken, it will be presumed that the jury is waived. *Wallace v. Smith*, 376.

See Administrators and Administration—*Dean v. Wade*, 85—*Wilson v. Imboden*, 140.

See Sheriff—*Mages v. Duncan*, 135.

See Supreme Court—*Police Jury v. Succession of McDonogh*, 341.

See Tutor—*Brown v. Crockett*, 80.

In suits for marital portion—See Succession—*Vapour v. Dupré*, 498.

PRESCRIPTION.

1. Service of an order of seizure and sale interrupts prescription. *Rhea v. Taylor*, 28.
2. The prescription of one year, established against certain real contracts, does not apply to those that are simulated. *Lee v. Whitehead*, 81.
3. Suit on a promissory note. Plea, prescription. Plaintiff had brought suit previously; was called and not appearing, was nonsuited. *By the Court*: In such a case, at least when unexplained, the Article 3485, C. C. applies, and the interruption is considered as not having occurred. *Bell v. Elliott*, 452.
4. The prescription of one year, established by Article 1989 of the Code, is not applicable to simulated sales. *Decuir v. Veazey*, 453.
5. The prescription of ten years, established by Article 3442 of the Code requires good faith in the purchaser. *Ibid*.
6. Decision in *Norwood v. Devall*, 7 Annual, 523, affirmed. *Mechanics' & Traders' Bank v. Theall*, 469.
7. Hypothecary action for a minor's mortgage founded on a judgment against the tutor. At the time the judgment against the tutor was obtained, the plea of prescription would have defeated the plaintiff—but the tutor did not set it up. *Held*—the renunciation of prescription by the tutor could not affect the right of defendant as third possessor, inasmuch as the defendant could at any time avail himself of the plea of prescription under Article 3429 of the Code. *Blanchard v. Decuir*, 504.
8. Where an administrator placed upon the tableau, as privileged, a judgment which had been obtained on a prescribed note in a suit in which the prescription had not been pleaded, a mortgagee whose claim existed at the time the prescription accrued, may set it up against the judgment creditor. *Succession of Edmond Dejean*, 505.
9. The administrator had placed F. upon the tableau as a mortgage creditor, but ascertaining that the judgment was obtained on a prescribed note, moved for leave to strike off the claim. *By the Court*: The insolvent had an undoubted right to waive prescription; and after it had accrued, the natural obligation which remained was a sufficient consideration for the subsequent promise to pay. The judgment on that promise is binding. *Ibid*.

PRIVILEGE.

1. The confidential and head clerk and manager of a bar-room and eating-house, has a privilege for his wages on the movables of the establishment.
Succession of Caldwell, 42.
2. W. had charge of the ten pin alleys, and received the money paid at them during the day, and made his returns when they were closed. If this occupation did not give him a privilege as an agent under articles 3158, 3181, 3219 and 3221 of the Code, yet it entitles him to be classed with servants, and as such gives him a privilege. *Ibid.*
3. Plaintiff sold to *Simpson* cotton for cash on delivery. It was delivered on the 4th of June, and the plaintiffs, by the delivery of the cotton, gave the purchaser the ownership of it, and he appeared as such, and got credit on his purchase accordingly in the market, without any notice, or interference on the part of plaintiffs on account of their unpaid balance, until the 9th following. The plaintiffs had no privilege on that day which could conflict with the rights of intervenors. By their incautious delivery the plaintiffs enabled *Simpson* to do that for which cotton is bought in this market—to get credit and speculate upon it.
Hill, McLean & Co. v. Simpson, 45.
4. In a building contract, in which it was provided that the contractor should be paid thirty thousand dollars, at the rate of twenty-five hundred dollars per month, on the certificate of the architect stating that the work done warranted the payment—it is incompetent for the sub-contractor who claims from the owner, under the Act of 1844, on the ground that the payments have been anticipated—to go behind the architect's certificate to show that it did not state the truth.
Rousselot v. Kirwin, 800.
5. The Act of 1844, in its terms and spirit, protects the sub-contractor, or workman, against all payments in anticipation made by the proprietor to the undertaker of a building subsequent to the delivery of an attested account. *Ibid.*
6. By the Act of 1844, the legislature intended to afford protection to the sub-contractor, or workman, or the furnisher of materials, against payments made in anticipation: and, under that statute, the delivery of the attested account fixes the rights of the parties at time of the delivery.
Moore v. Wire, 382.

See Lease—*Smith v. Blair, 10.*

Heirs of Lalaurie v. Woods, 366.

PUBLIC LANDS.

1. The perfecting of incomplete Spanish titles to the land in Louisiana, of right belongs to the legislative branch of the Federal Government, and their power to deal with such titles, in their political capacity, and to determine to whose benefit they should inure, is beyond the control of the Judiciary.
Riddle v. Ratliff, 106.

PUBLIC LANDS, (*Continued*).

2. In incomplete grants, where the land has been separated from the public domain, the King of Spain had no power, or discretion, which he could lawfully exercise in relation to it, and none passed to the United States. The land was and has remained private property, which no legislation of Congress could affect. *Ibid.*
3. Incomplete titles like settlement and cultivation, were mere equities, and the Government had the right to say in what manner they should ripen into perfect titles, and to establish a limit beyond which these equities should cease to have effect. The confirmation was the title, and inured to the benefit of the party to whom it was made. But in case of complete grants, the confirmation is not the title, but only its recognition, and in ascertaining the rights of parties, it must be laid out of view. *Ibid.*

PUBLIC PLACES.

4. The Legislature has, at all times, a right to change the destination of public places. *Parish v. Municipality*, 145.

RES JUDICATA.

1. Plaintiff claims from defendants a slave, through his wife, sole heir of *Frederic Christian*. Defendant sets up title through *his* wife, niece of *Christian*—to whom, he alleges, *Christian* donated the slave—and he pleads *res judicata*. In Tennessee one *Wheaton* had the slave in possession, and *Weld*, the present defendant, brought an action of *replevin* for the slave. *Wheaton* had hired the slave from *Christian's* executor. *Weld* bonded the slave, and took him into possession. The executor of *Christian* then brought an action of *replevin* against *Weld*, and by legal process obtained possession of the slave, and returned him to the possession of *Wheaton*. The matter at issue between the parties was, whether the slave had been given by *Christian*, during his life, to *Weld's* wife. *Held*: In Tennessee slaves are personal property, and can only be claimed from the executor. The proper party in interest in Tennessee was, substantially, the party litigant in relation to the title of the slave—and the plaintiff in this suit, acquiring title through him (the executor), ought to be bound by a judgment rendered against the executor as owner. Throughout these proceedings in Tennessee, the executor was a privy to *Wheaton*, he being a mere bailee and nominal party. This privy in estate binds the party by the judgment as effectually as if he had been a technical party to the record. *Johnson v. Weld*, 126.
2. The article 2265 of the Code, and others of the same section, must not be considered as a strict, arbitrary and technical enactment, but as one declaratory of the conditions of the *res judicata* as a principle of jurisprudence. *Ibid.*
3. These conditions of the *res judica*, established in order to ensure the ends of justice, have been received in the jurisprudence of the civil law in the light most favorable to attain them. The effect of the *res judicata* is, consequently, held to extend to the successors of the *ayans cause*, the assignees of the parties and to all those who claim through them. *Ibid.*

RES JUDICATA, (*Continued*).

4. Where the amount due by the husband to the wife has been fixed by a judgment obtained contradictorily with a creditor of the husband, such judgment is *res judicata* as to the amount due by the husband to the wife, as well against the assignees of the creditor as the creditor himself. *Judice v. Kerr*, 461.

REVOCATORY ACTION.

See Practice—*Bach v. Leopold*, 886.

SALE.

1. The usage, on the neglect or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for any deficiency in the amount of sales. *Mackoy v. Holton*, 48.
2. When at the time of the institution of a suit to rescind the sale of a slave, the vendor resides in Baton Rouge, and the slave is in a dying condition in New Orleans, no tender need be made. *Simon v. Burnett*, 84.
3. It seems that when the vendor refuses peremptorily to rescind the sale of a slave, no legal tender is necessary. *Ibid.*
4. The purchaser of a tract of land cannot refuse to pay, on the ground that the vendor's title has not been confirmed by the United States. *Woodward v. Ledoux & Co.*, 85.
5. In an action for the price of a thing sold, it is no defence that the buyer lacked the skill to discover an apparent defect. *Twibill & Edwards v. Perkins*, 133.
6. The ignorance of the vendor that the cotton sold by him was falsely packed, does not exempt him from liability for the difference between the value of the bales, in their actual condition, and what the value would have been if the quality throughout the bale had been uniform with the samples. *Fuller v. Cowell*, 186.
7. Where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference at the time and place of sale, between the actual value of the bales falsely packed, and what they would have been worth, if the entire contents had corresponded with the outer portion. *Ibid.*
8. Action for the price of sugar sold. Defendant pleaded non-delivery. Plaintiff offered to deliver the sugar, and placed the defendant in default by giving him a written notice to attend on the day fixed by agreement for the delivery of the sugar. *Held*: Thereupon the plaintiff's right of action accrued to compel the payment of the price. *Reine v. Poumairat*, 282.
9. No valid auction sale of real estate can be made when the description of the property sold is vague and indefinite. *Bonner v. Baker*, 283.
10. To make a valid auction sale of immovables and slaves, the authority given by the owner to the auctioneer should be in writing—as also the conditions on which the sale is to be made. *Ibid.*

SALE, (*Continued*).

11. The vendee who suffers personal property to remain in the possession of the vendor, and thus enables him to acquire credit, or to deceive a subsequent purchaser, cannot resist the claim of his vendor's creditors, nor that of a subsequent *bona fide* purchaser. *Beebe v. Robbins*, 470.
12. The transferee of a litigious right from one who purchased it, but was incapacitated to buy, under Article 2422 of the Code—to the knowledge of the transferee—acquires nothing—and the debtor, when sued, may set up the nullity of the sale. *McCarty v. Splane*, 482.
13. *Bona fide* purchasers, who have advanced their money upon the faith of the proceedings of a Court of justice—a judgment, execution and sheriff's deed—who have possessed peaceably for many years—who have expended large amounts in improvements—will not be turned out of possession on account of mere informalities, at the instance of a party who shows no injury, and exhibits no equitable ground for relief. *Barret v. Emerson*, 508.
14. Under Article 2456 of the Code, when the vendor retains possession, there is reason to presume that the sale was simulated. The presumption, however, is not conclusive—but throws on the vendee the burden of proving that the transaction was in good faith and the sale real.

Wartel v. Darbein, 506.

See Privilege—*Hill v. Simpson*, 45.

See Evidence—*Kennedy v. Beasley*, 88.

See Lesion.

SALES JUDICIAL.

1. When the Sheriff sells property, to the sale of which opposition has been made, the opponent can recover the property from the purchaser. His claim against the Sheriff is for the damages which the sale may have occasioned him—not for the value of the property sold. *Lobdell v. Union Bank*, 117.
2. To constitute a title translatif of property, the judicial sale must be accompanied by the judgment and execution. *Dede v. Boguille, f. m. c.*, 188.
3. In judicial sales the amount of mortgages assumed by the purchaser, and which turn out not to be due, enure to the benefit of the defendant in execution. *Demaret v. Hawkins*, 483.

See Mortgage—*Hebert v. Doussan*, 267.

SALES FOR TAXES.

1. Under the well-established jurisprudence of this State in relation to sales of land for taxes, no title passes, by a forced sale, under a defective description. *Wills & Rawlins v. Auch*, 19.
2. Under the Act of 1847, the Tax Collector is required to give a certificate in writing to the purchaser of lands sold for taxes. *Held*: that so to interpret the act as to make this certificate operate as a conveyance from the State, so as to vest an absolute title in the purchaser, and to establish it as evidence that all the formalities required by the statute had been complied with, the language of the statute must be imperative, and free

SALE FOR TAXES, (*Continued*).

from all ambiguity. Such a power, given to subordinate ministerial officers, would be in derogation of private property, and ought to be construed strictly, and not enlarged by intendment *Ibid.*

3. All proceedings for the recovery of State taxes are in the name of the State, and whether the conveyance is in the name of the State, or of the tax gatherer, the conveyance is a sanction, and if not a legal one, it can touch no man's property. *Ibid.*

SEAWORTHINESS.

See Insurance—*Lapens v. Sun Mutual Insurance Co.*, 1.

SEIZURE, AND SEIZURE AND SALE.

See Fieri Facias—*Stamborough v. McCall*, 9.

See Mortgage—*Bacon v. Maskell*, 507.

SEPARATION FROM BED AND BOARD.

See Husband and Wife—*Perkins v. His Wife*, 14.

SEQUESTRATION.

See Practice—*Bogart v. Rile*, 55.

SERVITUDES.

1. The law defines servitudes to be charges imposed on an estate for the use and utility of another estate. They accordingly terminate when things are in such a situation that the servitudes can no longer be used.—*(EUSTIS, C. J.) Parish v. Municipality*, 145.
2. The legal principle of ownership involves that of exclusive dominion and the right of enjoying and disposing of property independent of others, and under the sole restraint of the law. Servitudes are created by the dismemberment of the absolute right of ownership, which thereby becomes modified and imperfect. *(EUSTIS, C. J.) Ibid.*
3. The first presumption, presented by the fact of ownership, is clearly in favor of the absolute, perfect right, and no adverse right can be recognized, unless it results from presumptions which the law has established, or parties themselves have agreed as to its nature and purpose; and in this last case, the establishment of servitudes by covenant, certainty as to these relations is a requisite essential to their validity. *(EUSTIS, C. J.) Ibid.*
4. For the establishment of servitudes by the agreement of parties, they ought to be declared and described with certainty as to the property in favor of which they are created, as to the property subjected, and as to the nature of the charge imposed. *(EUSTIS, C. J.) Ibid.*
5. When a stipulation exists in favor of a person, the owner of an estate, the language might be such, or the whole tenor of the act be such, that a servitude might be fairly deduced; and in case of that kind, reference ought to be had to the respective conditions of the estate, as affected by the servitude, in their locality, uses, convenience and value. *(EUSTIS, C. J.) Ibid.*
6. Servitudes are restraints on the free disposal and use of property, and are, on that account, not entitled to be viewed with favor by the law. Hence servitudes, claimed under titles, are never sustained by implication; the

SERVITUDE, (*Continued*).

title creating them must be express as to their nature and extent, as well as to the estate which owes them, and the estate to which they are due.

Ibid.

7. The servitude of view is sometimes considered in law as including the servitude of prospect, as well as that of light. But it may well be doubted whether a servitude of prospect can be established in our modern cities, where the houses are contiguous and no open space, save the streets and public squares, are habitually left, except, perhaps, in the case of adjoining lots. And if it can, the great inconvenience which would result from it, makes it the duty of Courts not to recognize it without an express constitution of it by title, in favor of buildings erected, or to be erected.

Ibid.

8. The right of perpetual front on the river is a new and unusual servitude, which, even if established by the title, would not be recognized; and the authorization of the Legislature to sell a portion of the batture for building lots, is conclusive evidence that such servitude would have been against public policy. The same is true as to the servitude of prospect.

Ibid.

SHERIFF.

1. Sheriff sequestered live stock. The question being what allowance he should receive for keeping them. *Held*: The stock was kept in a pasture, and if any feed was given, there is nothing to shew the quantity and cost of it; besides this, it is shown that at the time of the sequestration the cows gave the defendant from forty to forty-five gallons of milk per day, for which sheriff does not account. His claim was therefore reduced. *Jure v. Ballatin*, 18.
2. Where the Sheriff levies property in the possession of the judgment debtor, the party representing himself as the owner, who sues for damages for an illegal seizure, must make out his title fully and clearly before the Sheriff can be mulcted. The duties of the Sheriff are delicate, and his responsibilities great, and unless Courts of justice are cautious in entertaining claims for damages against him, the efficiency of the law may be impaired. *Bennet, Tutriz, v. Starnes*, 77.
3. The Sheriff was sued for the value of certain movables seized and sold by him under a number of attachments. In his answer, he called on the attaching creditors to defend him and asked that they might be made parties to the suit, so that if judgment was rendered against him, he might have judgment over against them. All the creditors but one appeared and justified the seizure. *Held*: that the fee paid by the Sheriff to counsel for defending the attachment, was a claim to be paid by the attaching creditors. *Succession of Caldwell*, 45.
4. Case remanded because of *ex parte* amendment of Sheriff's return. *Magee v. Duncan*, 125.
5. If the Sheriff leaves the property in the possession of the debtor it is at his own risk. His responsibility for the goods levied on continues so long as he can keep possession of them under the execution. *Byrne & Co. v. Anderson*, 139.

See Courts—*Lisao v. Klayman*, 185

See Practice—*Lobdell v. Union Bank*, 117.

SIMULATION.

1. Simulated sale annulled. *Lee v. Whitehead*, 81.
2. The prescription of one year, established against certain real contracts, does not apply to those that are simulated. *Ibid.*
3. In an action to annul a simulated sale, the prayer of the petition was, that the property be "sold in satisfaction of petitioner's judgment;" but the judgment decreed the property "subject to the just claims of his (defendant's) creditors." An amendment of the decree was asked for so as to make it correspond with the prayer. *By the Court:* The appellee is entitled to the amendment. The Code of Louisiana contemplates that the revocatory action shall enure to the benefit of the creditor who has been at the expense and risk of prosecuting the action, (C. C. 1972,) and although we do not regard the present action as coming within the restrictions and limitations applicable to the *Actio Pauliana*, or *revocatoria*, yet there is certainly that analogy which the greater bears to the less; and the practice of our predecessors has been in conformity with the prayer of plaintiff's petition. *Decuir v. Veasey*, 453.

See Action—*Prescott v. Spurlock*, 7.

See Practice—*Bach v. Leopold*, 386.

SLAVES AND SLAVERY.

1. Mielkie, whose domicil was in Vicksburg, gave the plaintiff, his slave, in April, 1843, the following permit: "My negro woman Sarah Haynes, about thirty years old, has permission to pass unmolested to Cincinnati and the State of Ohio generally, or any other free State she may choose." *By the Court:* Her passage was provided for by her master, and she was sent to Cincinnati for the purpose of being made free. It does not appear that she remained longer than several days in Cincinnati, and she came to New Orleans in the same spring. The testimony shows that she has remained here since, with this exception, that in 1844, or 1845, she went to Vicksburg. We infer that she remained there but a short time. As the plaintiff has violated the law by coming into and remaining in this State in direct disobedience of its provisions, she cannot be considered as having acquired any rights, dependent on domicil or residence here, and her status must be determined by the laws of the domicil of her master. We cannot distinguish this case from that of *Hinds v. Brazeale*, 2 Howard's (Mississippi) Rep. 841; *Mary v. Brown*, 5 A. 271. On the principles recognized by this Court in *Liza v. Puissant*, 7 Annual, 88, the plaintiff would not be considered as having acquired her freedom by her presence in Cincinnati.
Sarah Haynes, alias Mielkie, v. Forno, 35.
2. The plaintiff was a slave in 1823. Her master was about removing from the District of Columbia to New York, and an indenture of apprenticeship of plaintiff, was made by her father to her master, to bind plaintiff until her majority. Her owner executed an act of manumission of plaintiff, and in the year of 1849, entrusted it to a gentleman of this city. *Held:* It seems as though the act of manumission and indenture

SLAVES AND SLAVERY, (*Continued*).

were made with a view to the change of residence which followed and most clearly manifest the intention of removing to New York, by the laws of which, in force at the time of the change of residence, it is provided, that any person, not being an inhabitant of that State, who shall be traveling to or from, or passing through the State, may bring with him any person lawfully held by him in slavery, and may take such person with him from the State; but the person so held in slavery shall not reside or continue in New York, more than nine months, and if such residence be continued beyond that time such person shall be free. The intention to reside in New York, and the actual residence there for, certainly, a year, being proved, the plaintiff became free.

Lucy Brown, f. w. c., v. Smith, 59.

8. The plaintiff's condition as a free person, could not be affected by the subsequent return to, and residence of her former owner with her, in the District of Columbia, as by a statute of Maryland, of 1796, it is provided that "it shall not be lawful to import, or bring into the State, by land or water, any negro, mulatto, or other slave, for sale or to reside within the State, and any person brought in the State as a slave, contrary to this act, if a slave before, shall thereupon, immediately cease to be the property of the person or persons so importing, or bringing such slave within the State." *Ibid.*

4. Permission for a slave to serve on a particular steamboat does not warrant his employment on another, without the consent of the owner.

Rountree v. Brilliant Steamboat Company, 289.

5. Arts. 174, 177 of the Code authorize a slave to make a contract for his emancipation.

Heirs of Trahan v. Trahan, 455.

See Evidence—*Hudnall v. Watt & De Saulles, 14.*

SUBROGATION.

For co-surety's right of Subrogation—See *Gossard v. Lacour, 75*

SUBSTITUTION.

See Donations and Testaments.

SUCCESSION.

1. An heir cannot contest the validity of a legacy, when sufficient remains after payment of the legacy, to pay him the full amount of his interest in the succession. *Adams v. Routh, 121.*
2. *Caldwell* was appointed curator of the succession of *Gates*. He filed a tableau which was opposed by *Marks*, through *T. A. Bartlette*, attorney at law, *Marks* claiming to be a creditor as a vendor of goods to one *Johnson*, for whom *Gates* became surety, as *Marks* alleged. The evidence was altogether parole. *Marks'* claim was rejected, but by consent of counsel a judgment of non-suit was entered. Subsequently *Caldwell* absconded, and *Walker* applied for the curatorship, through *Bartlette*, was appointed, and obtained judgment against *Leefe*, *Caldwell's* surety. Execution issued against *Leefe*, and the return showed that before the sale of the property seized, the case "was settled by the parties." During the summer vacation, *Walker* filed a tableau recognizing *Marks'*

SUCCESSION, (*Continued*.)

claim, which, not being opposed, was allowed; but the judgment of homologation was never signed. *Almira Gates*, the widow of *Gates*, sued to set aside the homologation, charging collusion between *Marks* and the curator, *Walker*. *By the Court*: the recognition of *Marks'* claim by the curator was collusive. *Walker* obtained the curatorship for the sole purpose of obliging *Marks*, and of enabling him to make his claim. It was an abuse of the forms of legal proceedings for the curator, under the circumstances, to place upon the tableau a claim which had been rejected, after trial before the Court. *Gates v. Walker*, 277.

3. The wife of the deceased, though she had lived apart from him, was not judicially separated from bed and board, and she had an interest in his estate, at least for the purpose of presenting her claim for the marital portion for adjudication. *Ibid.*
4. The Act of 1820, which provides that any person who takes possession of a vacant estate, or part thereof, without being duly authorized to that effect, &c., is not applicable to the heir of an estate who has the right, if he chooses, to take possession of the estate, and dispose of it as he pleases, subject only to the legal restraint of the creditors, and under the responsibility of paying the debts of the succession. *McMasters v. Place*, 431.
5. The sale of property belonging to an estate to which the seller has a simulated title, and the appropriation of the price to his own use—is such an acceptance of the succession as makes him liable as heir for the debts. *Ibid.*
6. Article 985 of the Code is a negative, pregnant with the affirmative, that if the heir had no title to the property sold by him other than that of heir, and no right to suppose that the property did not belong to the succession, he commits an act manifesting the intention to accept when he disposes of the property. A simulated title confers no right whatever. *Ibid.*
7. Until the succession is liquidated it is impossible to ascertain whether the wife died rich, and unless she did so, and the husband is shown to be in necessitous circumstances, the marital portion is not due. *Vasseur v. Dupré*, 488.
8. In a suit for the marital portion, the heirs must be made parties, the administrator having no capacity to stand in judgment. *Ibid.*
9. Where by the terms of sale of the property of an insolvent succession, fixed by the creditors, the property was to be sold on a credit—the “purchasers giving their obligation, with *two approved securities*, each,” &c.—it was the duty of the Administrator himself to require two good sureties, and the responsibility is his, if it was not done. *Fontenet v. Debailion*, 509.
10. Where by the terms of such a sale, the price of the property sold was to bear ten per cent. interest until paid, the Administrator is chargeable with the interest until the principal is paid; and it is no defence for him that he paid some of the claims against the estate before the expiration of the credit term. *Ibid.*

SUCCESSION, (*Continued.*)

11. *By the Court:* It is urged that the plaintiff has lost the benefit of his judicial mortgage by his failure to re-inscribe his judgment within ten years. It is far from clear that this principle is applicable to mortgages which an administrator is bound to raise for the purpose of selling the property and settling the debts of the succession. But even if it is, the plaintiff obtained a judgment that his claim should be paid with the benefit of his judicial mortgage. Besides it was the duty of the administrator to have paid the plaintiff, as a creditor with a judicial mortgage in 1841, and he cannot take advantage of any thing which has occurred from his constant resistance of payment until now, ten years afterwards. We consider, therefore, that the plaintiff has not lost the benefit of his judicial mortgage. *Ibid.*

See Administrators and Administration—*Porche v. Creditors of Succession of Banks*, 65
 See Donations and Testaments—*Cochet v. c., v. Lacoste*, 142

SUPREME COURT.

1. The Supreme Court is without jurisdiction to decide an exception taken to the trial of a cause before a Justice of the Peace on the ground that the Justice was interested in the cause.
West Baton Rouge v. Robertson, 69.
2. The Judge of the District Court was requested to charge the jury that the facts, as sworn to, did not constitute larceny. *By the Court:* the jurisdiction of the Supreme Court extends to criminal cases, on questions of law alone, and if we were to examine the facts on which the jury found the verdict, in order to determine whether the Court below erred in refusing to charge them that those facts did not constitute larceny, we would certainly be exceeding our jurisdiction, and deciding on the facts as well as the law. The facts proved in a cause constitute a basis for presumptions which can only be drawn by the jury, who are the legitimate judges of the law and fact in the finding of a general verdict, the only restraint on them consisting in the power of the Judge to set aside their verdict, when it is contrary to the law or the evidence.
State v. Cammeyer, 312.
3. The Supreme Court will exercise a discretion in entertaining appeals from *pro forma* judgments. The review of a *pro forma* judgment is not the exercise of original jurisdiction. And there can be no good objection to it in a case like this, where no question of fact is involved, and where the judgment was entered up in good faith, in order to speed the trial of a cause of great public importance.
Police Jury v. Succession of McDonogh, 341.

SURETY.

1. In the case of *Coffman v. Williams*, on a sale, *Cresup* as principal and *Morgan* (deceased) as surety, gave a twelve months' bond for the price of the property. On the 19th of July, 1849, the Sheriff had an execution on the bond, against *Cresup* and *Morgan*, and was about to levy, when, on the same day, *Hudson*, the attorney at law of *Coffman*, and the Sheriff, meeting *Cresup*, *Hudson* directed the Sheriff to return the execution, and took *Cresup's* draft on *Fellows, Johnson & Co*, of New

SURETY, (*continued*).

Orleans, payable to *Hudson's* order, on the first of the following November. *Hudson* endorsed the draft "without recourse," and forwarded it to *Coffman*, who kept it "a long time." The draft was neither accepted nor paid by *F., J. & Co.*, in whose hands *Cresup* had no funds. *Held*: If *Coffman* did not approve of *Hudson's* arrangement, he should have ordered a new execution and returned *Cresup's* draft. His long acquiescence discharged the surety.

Morgan, Administrator, v. Coffman, 56.

2. A surety has a right to be subrogated to the principal's rights against his solidary co-surety, to the extent of the co-surety's liability; and if the principal grants time to the co-surety, that would defeat the surety's right to the subrogation—the surety is discharged.

Gosserand v. Lacour, 75.

3. Surety discharged because of time granted to principal.

Peacock v. Chapman, 87.

4. The Act of 1844, requiring bond to be given to the State by the Register and Receiver of the Land Office, does not provide for the transfer, or assignment of it to individuals aggrieved by the Register. And it is not seen how the obligation of the sureties to the State can be extended by implication, so as to inure to the benefit of third persons.

Salttenberry v. Loucks, 95.

5. The condition of the bond is, that *Loucks* shall well and faithfully do and perform all the duties required of him by law, in his capacity of Register of the Land Office. To receive the price of lands sold is not one of his official duties:—that is expressly assigned to the Treasurer. The plaintiff deposited the price of the land bought by him with the Register. He made the Register his own agent, and the sureties have not warranted against the risks of this agency.

Ibid.

6. The surety, on a bond for the release of property attached, cannot be made liable until the condition of the bond be broken and the principal put in delay.

Goodman v. Allen, 381.

TAXES AND TAXATION.

See Police Jury v. Succession of McDonogh, 341.

TUTORS.

1. By the Statute of Tennessee, a testamentary guardian may maintain an action of ravishment of ward, or trespass against any person who shall wrongfully take away, or detain the person of the ward, and may recover damages for the same in such action for the benefit of the minor.

Brown v. Crockett, 80.

2. The tutor of a minor, deriving his authority from the law of their common domicile, has a right to exercise his personal actions everywhere. *Ibid.*

3. By the Statute of 1843, guardians of minors residing in other States of this Union, and duly appointed and qualified in such States, are entitled to sue for and recover any property, rights, or credits belonging to such minors within this State, upon producing satisfactory evidence of their

TUTORS, (*continued*).

appointment, without being under the necessity of qualifying as tutors according to the Laws of Louisiana. *Ibid.*

4. A will admitted to probate in another State, and nominating a guardian to the minor heirs, and who has been duly recognized there, need not be probated in our Court, to allow the guardian to maintain an action for the wrongful abduction of his ward. *Ibid.*

5. Under the law of Tennessee, the father of a minor child has a right by last will and testament to name a guardian for her. *Ibid.*

For Mortgage on the property of Tutors—See Mortgage—*Mercier v. Canonge*, 87.

See Minors—*Colomb v. Jones*, 442.

WILL.

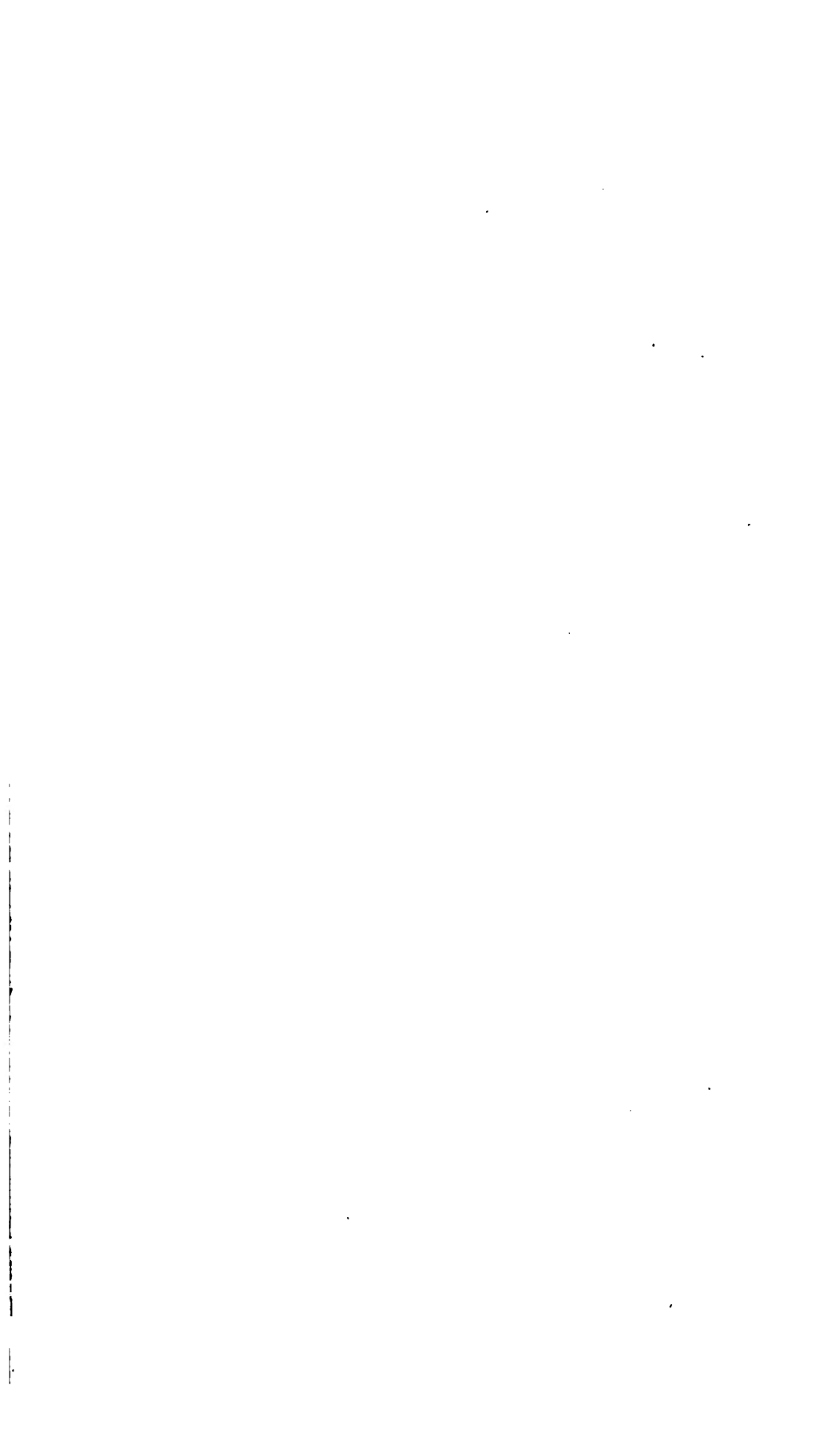
See Tutors—*Brown v. Crockett*, 30.

See Donations and Testaments.

WITNESS.

1. The testimony of the plaintiff—suing for the benefit of the minor, and who has no pecuniary interest in the event of the cause, was admissible. The objection would go only to his credibility. *Brown v. Crockett*, 30.
2. It is a general rule that whenever the credit of a witness is to be impeached by proof of anything that he has said, declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said, declared, or done that which is intended to be proved, in order that he may have an opportunity of explaining that which is *prima facie* contradictory. *State v. Cazeau*, 109.
3. One who is employed by plaintiffs at a fixed salary—but who was to have one-third of the profits, if the one-third exceeded his salary—is a competent witness. *Diggs v. Kirkland*, 309.
4. One bound for the claim sued on, in any event, is a competent witness. *Peck v. Dwight*, 449.

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